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India. Laws, statutes, etc. Codes,
Criminal

THE
PENAL CODE ACT XLV. OF 1860^{c /}
(Fifth Edition),

AS AMENDED BY LATER ENACTMENTS.

WITH

RULINGS OF ALL THE HIGH COURTS IN INDIA, AND THE
CHIEF COURTS IN THE PUNJAUB, OUDH, AND
THE CENTRAL PROVINCES,

ILLUSTRATED BY NUMEROUS DECISIONS FROM THE

EXISTING BODY OF THE LAW IN ENGLAND,

AND WITH

NOTES FROM THE REPORTS OF THE LAW COMMISSIONERS AND
FRAMERS OF THE ORIGINAL CODES, NOTES ON EVIDENCE,
LEGAL MAXIMS, ETC.

BY

FENDALL CURRIE, ESQ., OF LINCOLN'S INN,
BARRISTER-AT-LAW, AND OF THE OUDH COMMISSION.

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PREFACE TO FIFTH EDITION.

TO enhance the usefulness of this work as a Manual of Indian Criminal Law, the following additions have been made to the text of the Code :—

(1.)—It is noted opposite the several Sections whether the offence therein contained is cognizable by the Police, or not.

(2.)—Whether the offences contained in the several Sections are bailable, or not. And whether a warrant or summons shall ordinarily issue in the first instance.

(3.)—By what Courts the offences in the several Sections are triable.

N.B.—The information contained in the above three paragraphs, placed in the Code as therein indicated, economizes time and trouble, and saves a reference to the Schedule at the end of another book—"The Code of Criminal Procedure."

(4.)—References have been made in the several Sections of the Code to the definitions contained in Chapter II, thereby intending to remind the reader of the meaning to be put on those particular terms; careful attention to general explanations being requisite to avoid misinterpreting the Law.

(5.)—Act VI of 1864—"The Whipping Act"—has been interwoven with the Penal Code.

(6.)—The Sections of the Regulations and Acts still in force, regarding duties and responsibilities of proprietors and landholders in the matter of Police, under provisions of which Sections punishment may be awarded for omitting to give the information required, have been noted under the several Sections of this Code.

(7.)—Under all the Sections of the Code, where, by provisions of Section 89, C. C. P., information is compulsory, it has been noted in parenthesis, as follows:—(Information compulsory, Section 89, C. C. P.). Where, by Sections 222 and 225, Code of Criminal Procedure, the offence is triable summarily, the fact is noted under the Section of this Code referred to in the above-named Sections.

(8.)—Definitions of the following words:—"Property," "Forfeiture," "Clerk," "Servant," "Misappropriation," "Carrier," "Wharfinger," "Banker," "Merchant," "Factor," "Broker," "Artificer," "Labourer," "Person," "Reputation," and several others not given in Chapter II. "General explanations" have been given from "Wharton's Law Lexicon," and other Dictionaries, and will be found in their proper places under the Sections in which they occur.

(9.)—Several maxims of universal application, relating to public policy, to legislative policy, mode of administering justice, fundamental legal principles, evidence, &c., from "Broom's Legal Maxims," have been paraphrased for utility, and inserted in the body of the Code for reference and guidance.

(10.)—The law laid down by the English Courts on the

points to which they relate has been given under Sections that have not as yet received any authoritative construction from the High Courts in India, and in some instances the difference between the English and Indian law has been shown.

(11.)—Copious notes are given from the original Reports of the Law Commissioners.

(12.)—The published rulings of the High Courts of Calcutta, Bombay, Madras, and N.W. Provinces; also those of the Judicial Commissioners, Punjaub, Oudh, and Central Provinces, have been collected and paraphrased, and given under the several Sections to which they refer. Space admits of only an epitome of each ruling being quoted, for a knowledge of the arguments in which the ruling is furnished the published reports or books quoted must be consulted. The rulings quoted have been compiled from all the reports published in India, or procurable from the publishers of the three Presidencies.

(13.)—The alterations made in the Codes since their first passing into Law are noted.

(14.)—The provisions of special and local laws, in so far as they concern the provisions of certain Sections of the Codes, have been noted under those Sections; *e.g.*, Section 21, I. P. C., and Acts I, VII, and VIII of 1871; Sections 231, 239, 304, 311, 325, 363, 392, 395 to 400, 406, 436, 453, and 465 I. P. C., and Section 19, Act V of 1871; Section 228, I. P. C., and Section 82, Act VIII of 1871; Section 339, I. P. C., and Section 18, Act VII of 1870.

(15.)—The portions of the Sections commented on in the notes have been printed in italics, thereby making reference the more easy, and the number of Chapter and Section is given on the top of every page.

(16.)—The notes have been thrown as much as possible into the following shape : — (1.) Whipping, in italics. (2.) Information compulsory. (3.) Triable summarily. (4.) Definition of terms used. (5.) Notes from Law Commissioners' Reports. (6.) English Law on the subject. (7.) Provisions of Special and Local Laws. (8.) Regulations and Acts still in force; and (9.) High Court Rulings.

(17.)—An Introduction has been given, containing a short Historical Sketch of the Penal Code, and the work is supplemented with a full Index.

F. C.

INTRODUCTION.

A BRIEF HISTORICAL SKETCH OF THE INDIAN PENAL CODE.

THE original Penal Code was drafted by the Law Commission of 1834, which consisted of Lord Macaulay, Sir James M'Leod, Mr. Anderson, and Mr. Millett. This Commission completed and submitted the draft of the code to the Indian Government in October, 1837. This draft was circulated in the different Presidencies, and voluminous papers containing suggestions and criticisms on the draft code were resubmitted by the Government of India to the then sitting Law Commission. This Commission reviewed the code generally with reference to the suggestions and criticisms passed thereon, and executed a minute and critical examination of the original code, taking into consideration everything worthy of attention which they were able to find in the mass of comments on it, with which they had been furnished, and forwarded to the Government of India two detailed reports on the subject, the former in July, 1846, the latter in June, 1847. These reports contained the mature judgment of the Law Commissioners on the whole work, after carefully

considering all that had been said for and against the original draft.

Prior to the passing of the Penal Code, there was no uniform system of criminal law for all India. Within the local limits of the Presidency towns the English criminal law prevailed, while in the Mofussil each of the Presidencies had its own Regulations or local Acts for the punishment of crime. For it must be remembered that from the end of the last, and beginning of the present century, each Presidency had its own legislature; and it was only in the year 1834 that the legislative powers of the Government of Madras and Bombay were taken away, and the Governor-General in Council empowered to legislate for the whole of India. The strange anomaly in the jurisprudential condition of British India, consisting in the three Capital cities having systems of law different from those of the countries of which they were the Capitals, and of the Regulations being made by three different Legislatures, is more easily imagined than described. In Bengal, the criminal law was that which prevailed in India under the Mahomedan rulers of the country, modified by the Regulations of the Government of Bengal, and Acts of the Council of India. The Mahomedan criminal law may be described as both written and unwritten, the former being contained in many recognized treatises on Mahomedan law, and the latter being gathered from the practice of the country as expounded by the law officers in cases for which there was no positive written law. In Madras, the law was generally the same as in Bengal.

In Bombay the criminal law of the Presidency was contained in Regulation XIV of 1827, and four supplements, viz., Regulations XVII of 1828; III of 1829; XVI of 1830; and V of 1831. In this Presidency the Bombay Regulations were framed into a code of twenty-seven parts, subdivided into chapters and sections. The Penal Law of

Bombay had over the penal law of the other Presidencies no superiority except that of being digested. Apparently, no regard had been paid by the framers of the Bombay Code to the classification of crimes, or apportionment of punishment, on any principle; and, moreover, it contained enactments directly opposed to the first principles of penal law. The conquest of the Punjab in 1849 called into existence yet another system besides those already mentioned—one of clear, short, and simple rules of action, written in the current language of the day, and freed from all technicalities, and a procedure dealing out a substantial, though no doubt a somewhat rough-and-ready, justice, “rather than profound laws, to the discontent of all honest men.” This system worked so successfully, produced such good effects, and was fraught with so many advantages both to the people, and the officers charged with the administration, that, on the annexation of Oudh, the Punjab system, and not the voluminous Regulations of the older Provinces, was introduced into the former Province.

By what has been already said, it will be seen that there were *three* systems of criminal law in force in the *Mofussil*, and that the Capital cities had a system of law different from that of the countries of which they were the Capitals, *i.e.*, the English criminal law, “that is to say, a very artificial and complicated system; a foreign system; a system framed without any reference to India; a system which, even in the country for which it was framed, is generally considered as requiring extensive reform.”* The newly conquered and recently annexed territories had yet another and a separate system, to wit, a system of simple codes, codes imperfect, no doubt, but containing rules easily acquired, and capable of being effectively worked, and a procedure simple, summary, and to the purpose. The

* Letter to Lord John Russell, from the Commissioners appointed to Inquire into the State of the Criminal Law, dated 19th January, 1837.

existence of so many different systems was productive of some curious anomalies. For instance, "in Bengal a forger was liable to double the punishment of a perjurer; while in Bombay, things were just the reverse, and the perjurer could get twice as much as a forger; while in Madras the two offences were on exactly the same footing. In Bombay, the escape of a convict was punished with a term of imprisonment double of the term assigned to the same offence in the other two Presidencies. A coiner got almost twice as much in Bengal and Madras as he could get in Bombay. In Bengal, purchasing of regimental necessaries from soldiers was not punishable except at Calcutta, and there with only a fine of sixty rupees; in Madras, with a fine of forty rupees; and in Bombay, with imprisonment for four years." Thus widely did the systems of penal law differ from each other.

There was also the Moulvie Adawlut system. As in the Roman empire, before Justinian's time, Roman jurists were consulted by the judges in cases of difficulty, and acted as assessors to the magistrates, to guide them in their judicial decisions, so in India Mahomedan jurists were consulted, and acted as assessors to the magistrates. The result of this system in India was as follows: "Nothing was more common than for the Courts to ask the law officer what punishment the Mahomedan law prescribed in a hypothetical case, and then to inflict a punishment on a person not within the hypothetical case, and who, by the Mahomedan law, would be liable either to a different punishment, or to no punishment at all."*

Notwithstanding this anomalous state of affairs, and the reports of the Law Commissioners against the then existing state of criminal law in India, and their strong recommendations for its immediate alteration, notwithstanding

* Letter to Lord Auckland from the Law Commissioners, dated 14th October, 1837.

their valuable contribution towards this end in their draft code, the Penal Code did not pass into law for nearly a quarter of a century after the first draft was presented to the Indian Government.

Why, it may be asked, this protracted delay? Because (1) shortly after the original draft of the code had been submitted to Lord Auckland there came the unfortunate Cabul disasters, and the latter years of his Lordship's Governor-Generalship must have been fully occupied in repenting at leisure, the step he had taken in haste.

Lord Ellenborough, on his arrival, had enough to do to avert the disaster which his predecessor had left him as a legacy. In his third year Lord Ellenborough was recalled. Lord Hardinge had the first Sikh war on his hands, and Lord Dalhousie's time was fully occupied with the conquest of the Punjab and the annexation of Oudh. Lord Canning, soon after his arrival, had to face the mutiny of 1857. So that during all these years, from 1842 to 1857, men's minds were necessarily taken up with other things. (2) Again, the reformers of the old system had to battle against the natural dislike of those who, having mastered one system, had to unlearn what they had acquired by years of hard study, and learn another and wholly new system. Moreover, there were of course many who anticipated evil in the proposed innovation. (3) Again, the ever-changing nature of the Indian legislature is in a measure accountable for delays, for if one set of councillors do not carry through their projects during their term of office, their successors, in justice to themselves, must go all over them again; or else such measures are left alone altogether, till some one chooses to take them up and carry them through.

When at last the Penal Code was passed and became the law of the land, it superseded the old Regulations; this was an advantage over the system adopted in the con-

solidation of the English criminal law, "where the old law still survives, though it is scrawled over with exceptions." The Law Commissioners could hardly act otherwise than they did in the matter; for, as they say, "the entire abrogation of the Mahomedan law was necessary to relieve the criminal jurisprudence of the country from a barbarous encumbrance."

From the year 1860 may be said to have commenced the era of codification for India. From 1834 to 1860 much was done in the way of re-enacting and casting into more convenient shape the existing Acts and Regulations; but since the passing of the Act XLV of 1860 and the present time, the law of India relating not only to criminal but also to civil matters has been almost completely codified, to wit, the Codes of Criminal and Civil Procedure, the Indian Succession Act, the Indian Evidence Act, the Indian Contract Act, and the Indian Limitation Act. The Indian Law Commissioners had to face the brunt of the work in the earlier stages of codification, and it should be borne in mind that they were called upon to frame a Penal Code, while the substantive criminal and civil law were dark and confused, making a difficult task doubly difficult. They were not spared censure for the course they adopted, in drawing up the Penal Code. Their production was in some quarters termed "an invention based on theoretical, not practical, principles;" but those who found fault with them were not agreed as to what the Commissioners ought to have done. Time has shown that such criticisms were unjust. In later years, Sir Barnes Peacock, Sir H. Maine, and Mr. Fitzjames Stephen have added the result of their valuable experience to the work of codification, and have left behind them, in the codes at present in force in India, monuments of legal thought and ability, of the greatest practical value to those engaged in the administration of the law and to the natives of India.

The original draft of the Penal Code contained certain chapters which were finally omitted from the Penal Code when it passed into law. The first of these was, "of offences relating to the Revenue." It was considered best to leave all transgressions of the Revenue laws to be provided for by appropriate penalties, in the laws which contained the rules, the observance of which was intended to be enforced thereby. To have retained this chapter in the Penal Code would have in some measure confused punishments with penalties, as this chapter dealt with the latter, and the rest of the code with the former. Chapter XVI. of the draft code "of illegal entrance into and residence in the territories of the East India Company," and Chapter XVII., "of offences relating to the press," were also omitted from the Penal Code, as finally enacted. In the original draft, the Commissioners recommended, and for very good reasons, that the offence of adultery should be omitted from the Penal Code. Against their views it was urged that adultery was recognized as an offence by the existing law. It was punishable by the Code Penal of France, and was provided for in the Code of Louisiana, and it was further argued that if the law refused to punish this offence, the injured party would take the law into his own hands. After *some hesitation*, the then Commissioners came to the conclusion that it was not advisable to exclude the offence of adultery from the Indian Penal Code. The presence of this provision in the code is, I think, of doubtful advantage; because (1), all attempts on the part of foreigners to intrude and drag into public gaze private family matters causes disgust and scandal. (2) If the principle is sound on which the offence is excluded from the penal law of England, where so great a disability attaches to illegitimacy, *à fortiori* it applies in a society where illegitimacy does *not* carry with it the serious disabling consequences incidental to it under

codes based upon Christianity. (3) If the argument of taking the law into one's own hands is of any weight in India, amongst a people who have been allowed by the framers of the Penal Code so great a latitude to the exercise of the right of private defence, "because they were not framing laws for a bold and high-spirited people, accustomed to take the law into their own hands," but for "a people too little disposed to help themselves, and to go beyond the line of moderation in repelling injury," this argument ought to be very weighty indeed in England. Is it a fact, that the consequence of the absence of such a provision from the penal law of England has been "assaults, duels, assassinations, poisonings"? (4) Because the law as it at present stands is one-sided. The man is punishable, the woman not. The framers of the code say they would omit adultery from the Penal Code, because "girls are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt." The legislature settles the matter, by coming down on the man and letting the woman go free. I suppose it would not be correct to call this unequal legislation as long as the provisions of Section 497 (adultery) act as a set-off to Section 494 (bigamy); for as this latter section can, in a polygamous society, operate chiefly if not only against the female population, so a section was needed which touched only the males and let the females go free. This certainly has the advantage of technical symmetry, but little else.

To make matters worse, if that were possible, the Code of Criminal Procedure restricted the right of prosecuting in such cases to the injured husband. For *enticing away*

a married woman with criminal intent, the husband of the woman, or person having care of her on behalf of her husband, could prosecute the offender. There is *practically* very little difference between these two offences. In both cases the female is willing. In the former, the man has intercourse with the woman in her husband's or guardian's house; in the latter, the man and woman walk off together to the adulterer's abode or elsewhere. The only other difference is that Section 498 applies to one female enticing away another for the purpose that the enticed one may have sexual intercourse with some man who is not her husband. As an instance of the hardship above alluded to, take the following example:—A goes to Hyderabad, leaving his wife B at Fyzabad, under the care of his parents C and D. E gets into her good graces, and an immoral intimacy grows up between them. A's direction is not known. C and D cannot read or write. A may be away two or three years. C and D are cut by all their neighbours because they do not bring E to justice. E and B go on openly in their shameless intercourse. Adultery is an offence under the Penal Code, but the law provides no remedy; if E did not add insult to injury, but took B off with him to his own house or elsewhere, instead of carrying on connection with her in her own parent's house or grounds, E could be prosecuted under Section 498. It is well known that when a man leaves his home for service—and it may be service in the army or some other department of the Government—he leaves his wife, as a rule, with his own parents or hers, and they are looked upon as her guardians, standing in the place of her absent lord, and she might be enticed to dishonour and disgrace, adultery all the time being an offence under the Penal Code, and the law gave her guardians no power to bring the enticer to justice. The procedure on this point has been altered by the present Code

of Criminal Procedure (Act X of 1872), and *the guardian* of the female can now prosecute the adulterer. The Indian Press has hinted that the alteration now made will cause no small scandal; but if adultery was an offence under the Penal Code, I do not see how the Procedure Code could with justice deprive a large portion of the community of the power of taking advantage of Section 497. The best thing would have been to expunge Section 497 from the Indian Penal Code, as originally recommended by the framers of the code.

Although the Penal Code as finally passed was somewhat altered on some few points, yet the framework phraseology, and the most important parts of Act XLV of 1860 were identical with the original draft. The 511 sections of the above Act contained, if not the whole, yet the bulk of the criminal law of British India. The Penal Code came into force on the 1st January, 1862.* The Penal Code was first altered by Act IV of 1867. This Act enlarged the meaning of the word offence in certain sections of the Penal Code, applying it under certain circumstances to special and local laws. The Penal Code was amended by Act XXVII of 1870.

This Act amended certain sections and altered others. The chief alterations made by this Act related to the punishment of political offences. The code did not punish at all a mere conspiracy to wage war, nor did it punish any treasonable practice or conspiracy short of an attempt to wage war. This defect was removed by inserting the present Section 121A, providing for the offence of conspiracy to wage war against the Queen, or to wage civil war. This section immensely tightens the grip of the law on treasonable combinations. Such a provision as is contained in this section is especially necessary to India, and is well understood and appreciated by the natives

* Act VI, 1861.

themselves. The Penal Code contained no provision whatever with respect to exciting feelings of disaffection of the Government by speaking or writing. In the draft code prepared by the Indian Law Commissioners was a section dealing with this point, and its omission from the code, as ultimately enacted, was due (as Mr. Fitzjames Stephen conclusively showed) to a mere oversight. The omission was rectified by the insertion of the present Section 124A.

The material part of the Lottery Act was added to the chapter on public nuisances, and Act V, 1844, repealed. A paragraph was added to Section 307 punishing attempts at murder by life prisoners with death. The code had omitted to punish offences known in England as "manslaughter by negligence." This omission was remedied by enacting the present Section 304A. There were some few other alterations; for instance, the enlarged definition of the word "offence" was embodied in the interpretation clause of the Penal Code, and extended to certain sections of the code, *e.g.*, prior to the passing of this Act, the offence of abetment could only be committed in respect of offences under the Penal Code, not of offences under any special or local law, nor of offences under the English law. This defect was not cured by Act IV of 1867. As regards the abetment sections, Act XXVII of 1870 cured what Act IV of 1867 left unmentioned and untouched. The provisions of Section 34 of the Indian Penal Code were modified so as to make the terms of that section apply to acts done "in furtherance of the common intention of all;" and a proviso as to sentences of penal servitude passed on European or American offenders was added to Section 56.

Since the passing of Act XXVII of 1870 the Penal Code has been amended by Act XIX of 1872. The object of the amendment introduced by the latter Act was to check the practice of counterfeiting the copper coin of

native states. The Penal Code prohibited the counterfeiting of *coin*. *Coin* was defined as "metal stamped and issued by the authority of some *Government*." And *Government*, by Section 17 of the Penal Code, denotes "the person or persons authorized by law to administer executive government in every part of *British India*." Hence a coin of native states was not "coin" according to the definition of the Penal Code. Another amendment was also made in this section (230); the words "for the time being" were introduced before the word "used" in that section. In the above section "coin" was defined as metal "*used*" as money. It was suggested that this definition might possibly be held to include a Græco-Bactrian stater, formerly used as money, but now regarded only as a curiosity.

In the December number of the *Law Magazine and Review* appeared a paper by Mr. Fitzjames Stephen, on "Codification in India and in England." In this valuable paper the author shows the advantages of codes in general, and of the Penal Code in particular, and points out how "a large number of unprofessional judges understood it with perfect ease, and administered it with conspicuous success"; and further on, he rightly remarks that "to compare the Indian Penal Code with English criminal law was like comparing cosmos with chaos."

But why is it that codification in India has been so easily and rapidly attained, while the criminal law of England is still in a state of chaos? The reason I think is, because it is a far easier matter to consolidate or codify a century of legislation, wholly contained in a given number of Regulations and Acts; Acts which have not the value of the sanction of long prescription, and Regulations around which no historical associations cling, than to do likewise to half a century of judicial decisions embodying the principles of the common law of the land, buried in

documents, the number and bulk of which are immense, the contents of which are inaccessible to the many, and imperfectly known even by the profession ; and to make confusion more confounded, surrounded by prejudices, reasonable and unreasonable, against any innovation ; and the fear of the unsettlement that ever follows change. That it is far easier to codify the written than the unwritten* law is evident from the fact that the several Acts of Parliament on the subject of criminal law have been more than once re-enacted within the last half-century, whereas little, if anything, has been done towards bringing into a limited compass, and under one regular superstructure, the great mass of case law, nay, rather (since reporting has taken its present course), round the consolidated Acts has grown, and is growing up, case-law to a somewhat alarming extent, contained in voluminous reports running loose all over the field of legal literature, devoid of arrangement, and deformed by technicalities, without any attempt at system or connection. Well may such a state of things be termed chaos ; but it is erroneous to argue that because codification has been so easily carried out in India it is as easy in England. Speaking of the advantages of codification with reference to the study of the law, the Law Commissioners say, "It is not the least of the many advantages of the Penal Code of which the principles are purely rational, and of course always consistent with each other, that a student may become thoroughly master of it, without the aid of extrinsic learning." And a little further on they talk of "*historical and antiquarian knowledge*," as no doubt "*an elegant and even a useful accomplishment*." The words italicized appear

* By *unwritten* I mean, "law which flows immediately from a subordinate source — law not made by the supreme legislature." What Sir H. Maine terms written case-law, as distinguished from written code-law.

to me to treat the ignorance of the principles of jurisprudence outside the four corners of the Indian Penal Code with unusual respect, and to claim for the provisions of the Penal Code an exhaustiveness unattainable by any code, considering the imperfection incidental to the most copious and precise of human languages. Such "extrinsic, historical, and antiquarian" knowledge, as the history and philosophy of law, must have been well understood by the framers of the Indian Penal Code, or we should never have had a code which, according to Sir H. Maine's idea, "is undoubtedly destined to serve some day as a model for the criminal law of England"; and unless this same knowledge continue to be studied, the present code must deteriorate. No doubt the Penal Code can be sufficiently understood so as to be fairly administered without any extrinsic learning; such a possibility is undoubtedly an advantage; but to call historical and jurisprudential knowledge "merely an elegant and even a useful accomplishment," is treating a most important and essential matter somewhat lightly. Such a term as "*elegant accomplishment*" might with propriety be used with reference to young ladies dancing and singing, but hardly with reference to the study of the legal history of one's own and other countries, and the principles of the science of jurisprudence by men *whose duty it is to administer the law*. "A man familiar with such principles, as detached from any particular systems, and accustomed to seize analogies, will" (says Austin) "be less puzzled with Mahomedan or Hindoo institutions, than if he knew them only *in concreto*, as they are in his own system; nor would he be quite so inclined to bend every Hindoo institution to the model of his own."

F. C.

C O N T E N T S,

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31.	I. J.	INDIAN JURIST.
32.	J. C.	JUDICIAL COMMISSIONER.
33.	J. C. O.	Do. Do. OUDH.
34.	J.	JUDGE.
35.	K. A. L.	KENT'S COMMENTARIES AMERICAN LAW.
36.	L. C. R.	LAW COMMISSIONERS' REPORT.
37.	L. M. & R.	LAW MAGAZINE AND REVIEW.
38.	MACK. R. L.	MACKENZIE'S ROMAN LAW.
39.	M. A. L.	MAINE'S ANCIENT LAW.
40.	M.	MAGISTRATE.
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THE INDIAN PENAL CODE.

CHAPTER I.

WHEREAS it is expedient to provide a General Penal Code for British India; It is enacted as follows :—

1. This Act shall be called THE INDIAN PENAL CODE, Title and extent of and shall take effect on and from the 1st operation of the Code. day of May, 1861, throughout the whole of the Territories which are or may become vested in Her Majesty by the Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales' Island, Singapore, and Malacca.

By Act VI of 1861 the Penal Code was to take effect from 1st January, 1862. Act XVII of 1862 laid down the procedure and powers in the investigation and trial of offences committed before the 1st January, 1862.

The Penal Code since its first becoming Law has been altered twice, viz.: By Act IV of 1867 and XXVII of 1870. The former Act enlarged the meaning of the word "offence" in certain sections of the Penal Code applying it under certain circumstances to special and local laws. The latter Act amended certain sections and added others. All the amendments and alterations made by the Acts are noted under the sections to which they refer in the body of this Code and notes thereto, as also are the amendments in the Schedule of the C. C. P. by Act XXXIII of 1861, Act VIII of 1866, Act VIII of 1869 and the Act of 1872.

The Penal Code was extended by the Governor General to the Island of Nancowry and to all other Islands included in the group commonly known as the Nicobar Islands: that is to say, the land of Car-Nicobar

and Great Nicobar, and the Islands lying between them, by Government Notification No. 4918, dated Simla, 27th October, 1869, published in the *Gazette of India*, No. 44 of 1869, dated 30th October, 1869. The Nicobars lie fifty miles south of the Andamans. Formerly the Danes maintained a small military post on these Islands; but it is many years since they deserted these islands. Some two or three years ago Captain Morell, R.N., under orders from Government steamed over from Rangoon, planted the British flag on the islands, and read a proclamation in bad Malay, declaring the Nicobars to be the property of the Queen. These islands, abandoned as valueless by the Danes, promise ere long to develop into an importance quite out of proportion to their territorial extent. By Foreign Department, No. 93 of 26th May, 1871, the Governor General in Council applied the provision of Act XXVII of 1870 to the Hyderabad assigned districts.

2. *Every person* shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty, *within the said Territories* on or after the said first day of May, 1861.

Punishment of offences committed within the said Territories.

By the wording of this section 'all persons become liable for intra-provincial offences to the operation of this Code. To offences committed on the sea within three miles from the coast the Penal Code applies, for the "*lex loci*" must needs govern all criminal jurisdiction. That part of the sea between high and low water is within the body of the adjacent land, and within the jurisdiction of the Criminal Courts.

Every person.—A person who is admittedly a subject of the British Government, is liable to be tried by the Courts of this country for acts done by him, whether wholly within or wholly without the British territories in India, provided they amount together to an offence under the Penal Code (2 W. R., 60, 61). And so under Act I, 1849, the High Court, Calcutta, confirmed the conviction of two persons for murder committed in the independent territory of Cooch Behar, they being British subjects and only temporary residents of that State (1 W. R., 39).

(*Within the said territories.*) This section excludes the destruction of a vessel at a distance of more than three miles from the coast, as being an offence committed *beyond the said territories*.

According to writers on international law, the territorial right extends to at least three geographical miles, a sea-league, from the coast, that having been supposed to be the range of a cannon-shot: the rule being, according to Bynkershoek, *potestatem terræ finire ubi finitur armorum vis* (*De Dominio Maris, Cap. II*). This distance of three miles was the limit lately laid down by the Privy Council, in *Rolet v. The Queen* (L. R. I. Priv. C. Ca. 198), for the operation of the Revenue Laws of Sierra Leone. Sir R. Phillimore, in his Commentaries, vol. I, plac. CXCVII (and see vol. III, plac. CCCLII), says: "But the rule of law may be now considered

as fairly established :—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty, or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot from the shore at low tide.” He adds, however, that Great Britain and the United States have, for some special purposes relating to the revenue in time of peace, and to the hovering of foreign belligerent vessels in time of war, extended the limit to four leagues. Wheaton speaks to the same effect. His commentator, Mr. Lawrence, suggests that “the distance that a cannon-shot will reach has been increased in a remarkable degree by modern inventions; and, consequently, the sovereignty over the coast may be deemed to be proportionally extended.” Adhering, however, for the present, to the distance of three miles from low-water mark, laid down by the Privy Council in *Rolt v. The Queen*, as the limit of what is called maritime territory, we must guard ourselves against any supposition that we mean to suggest that the Admiralty Jurisdiction of this court does not commence until that limit be passed. That jurisdiction commences where the open coast terminates. The coast is not the sea adjacent to the land, but is the land which bounds the sea : it is the limit of the land jurisdiction. This limit varies according to the state of the tide. When the tide is in, and covers the land, the space so covered is sea ; when the tide is out the unoccupied space is land as far as low-water mark. The interval between high and low water mark must, therefore, be considered as *divisium imperium*, unless the water be, as Sir John Nicholl says, within a county. (See 3 Haggard Adm. Rep. 275, 283.) The case of *Regina v. The Pauline* (9 Jur., 286 ; S. C. 3 Notes of Cases, 616) well illustrates this doctrine. The vessel in that case was wrecked on the Pole Sands, near the mouth of the Exe, and was taken possession of while stranded there. She then was lying aground within low-water mark, but the tide had not so far ebbed as to leave her dry. In fact the boat, by means of which she was boarded, floated alongside her. The question was whether she was *wreckum maris*, or a droit of the Admiralty ; if the former, she belonged to the Lord of the Manor ; if the latter, to the Crown. Judgment was given in favour of the Crown. It is plain that the Admiralty can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide. The Central Criminal Court in a recent case unanimously held, that the Bristol Channel at a place where it is ten miles wide between Glamorganshire and Somersetshire is between the bodies of these two bounding Counties, the line of division being it would seem *ad medium filum aqua*. Therefore a felony committed on board a ship within three quarters of a mile of the Glamorganshire coast was held to be committed within the County of Glamorgan (7 Bo. H. C. R., 105).

Within the said territories the Penal Code is not applicable to offences committed on the high seas and without the territories of British India, and a subject of the Queen prosecuted for an offence so committed, and not on board a foreign ship, must be charged with an offence against the English Law.

3. *Any person* liable, by any law passed by the Governor

Punishment of offences committed beyond, but which by law may be tried within the Territories.

General of India in Council, to be tried for an offence (40) committed beyond the limits of *the said Territories*, shall be dealt with according to the provisions of this Code for any act (32) committed beyond the said Territories, in the same manner as if such act had been committed within *the said Territories*.

Section 11 of Act XI of 1872 provides for the arrest and removal of persons, other than European British subject, escaping into British India—and the following are the sections of the Indian Penal Code referred to in Section 11.

Sections 230 to 263, both inclusive; Sections 299 to 304, both inclusive; Sections 307, 310 and 311; Sections 312 to 317, both inclusive; Sections 323 to 333, both inclusive; Sections 347 and 348; Sections 360 to 373, both inclusive; Sections 375 to 377, both inclusive; Sections 378 to 414, both inclusive; Sections 435 to 440, both inclusive; Sections 443 to 446, both inclusive; Sections 464 to 468, both inclusive; Sections 471 to 477, both inclusive.

4. Every servant of the Queen (14) shall be subject to punishment under this Code for every act or omission contrary to the provisions thereof, of which he, whilst in such service, shall be guilty on or after the said 1st day of May, 1861, *within the dominions* of any Prince or State in alliance with the Queen, by virtue of any treaty or engagement heretofore entered into with the East India Company, or which may have been or may hereafter be made in the name of the Queen by any Government of India.

Punishment of offences committed by a servant of the Queen within a foreign allied State.

Within the dominions.—This section applies to servants of the Queen who commit offences against this Code within the dominion of any Prince or State in alliance with the Queen. *In re R. v. Chill.* the Bo. H. C. held that a E. B. subject is liable to be tried in the High Court for an offence against the Indian Penal Code committed in the territories of a native Prince in alliance with Government upon charges framed under the Penal Code (8 Bo. H. C. R., 92).

5. Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 and 4 William IV, Chapter 85, or of any Act of Parliament passed after that Statute in anywise affecting the East India Company,

Certain laws not to be affected by this Act.

or the said Territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of Officers and Soldiers in the service of Her Majesty or of any *special* (41) or *local law* (42).

The words "or of the East India Company, or of any Act for the Government of the Indian Navy," in original Code were repealed by Act XIV, 1870, Section 1 Schedule, Part II.

Special or Local Law.—Held, that when facts proved constitute an offence under a special law, the conviction cannot be upset on the ground that the same facts amount to an offence under the Penal Code (8 W. R. C. R., 55). The object of this First Chapter is to substitute the present Code for the existing Criminal Law of India. The general repeal of the Penal laws was not contemplated, nor was it advocated by the Law Commissioners on their recommending the present enactment termed the Penal Code. What they considered would be more expedient was to provide only that no man should be tried or punished (except by a Court Martial) for any facts which constitute any offence defined in this Code. "It is possible," they say, "that a few actions which are punishable by some existing law, and which the Legislature would not desire to exempt, may have been omitted from the Code; and in addition to this consideration, it appears to us that actions which have been made penal on special temporary grounds ought not to be included in a general Penal Code intended to take its place amongst the permanent institutions of the country."

CHAPTER II.

GENERAL EXPLANATIONS.

This Chapter is one that will continually have to be referred to, as it contains the definitions and interpretations of the offences and penal provisions of this Code, and it is only by bearing in mind these definitions that accuracy in administering the Code can be obtained. References have accordingly been made in the several sections and chapters of the Code to the definitions contained in this Chapter, so that the requisite knowledge to avoid misinterpreting the law may be easily turned up and examined. With reference to interpretation, Blackstone remarks: "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was

made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of them all. *Words* are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use." (Accordingly, where words occur such as "*Labourer*," "*Artificer*," "*Agent*," &c., definitions of which are not given in this Chapter, their definitions from Wharton's Law Lexicon, or some other books of reference, have been given under the section in which they occur.) *Context*. If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate. *Subject-matter*. Words are always to be understood as having a regard to the subject-matter, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. *Consequences*. As to the effects and consequences, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. *Reason and Spirit*. But the most universal and effectual way of discovering the true meaning of the law when the words are dubious, is by considering the reason or *spirit* of it, or the cause which moved the Legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it (Blackstone, vol. I, pp. 44, 45, 46). But this rule of interpretation *cessante ratione legis, cessat lex ipsa*, applies only to precedents, and does not apply to Statute law. For in Statute law, the law is one thing, the reason another; the law as a command may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated; but there it is, the solemn and unchanged will of the legislator, which the judge should not take upon himself to set aside, though he may think it desirable that it should be altered. But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the *ratio decidendi* being gone, there is no law left (37 Aust. Jur., 652). In the first place, the judge is bound to restrict himself to the letter of the law, and he must in no wise trouble himself with the "*ratio juris*." Hence every extension and restriction of the law, according to the "*ratio juris*," is inadmissible, and the rule is false which says "*Cessante ratione legis, cessat lex ipsa*" (T. & J. M. R. L., 33). The preamble of an Act may be resorted to in restraint of the generality of the enacting clause, when it would be inconsistent if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful. This is the whole extent of the influence of the title and preamble in the construction of the statute. It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute taken and compared together. The real intention when accurately ascertained will always prevail over the literal sense of terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion.

The words of a statute if of common use are to be taken in their natural, plain, obvious, and ordinary significance and import; and if technical words are used they are to be taken in a technical sense unless it appears otherwise from the context. Penal statutes are to be construed strictly. By this is meant only that they are not to be so extended by implication, and beyond the legitimate import of the words used as to embrace cases or acts not clearly described by such words (K. A. L. 10th edition, 519-525).

6. Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision, or illustration.

Definitions in the Code to be understood subject to exceptions.

Illustrations.

(a.) The sections in this Code which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences: but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b.) A, a Police Officer, without warrant apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."

What place do *illustrations* hold in the Code, and what was the intention of the authors of the Penal Code with reference to these illustrations? The Law Commissioners in their first Report say, "The illustrations are intended to serve precisely the same purpose as examples in grammar, and as of examples in grammar or in any science it is not to be supposed that they ever 'supersede or vary' the rule they are intended to illustrate. They show as far as they go what the authors of the Code meant by the enactments. It would be as unreasonable for a judge to refuse to decide according to the illustration, in a case exactly parallel, as it would be in a student in attempting to apply a rule of grammar to refuse to follow the example set for the very purpose of guiding him in its application. Yet the example is not said to limit the rule. No more should the illustration be said to limit the enactment. No more is the illustration a part of the enactment than the example is a part of the rule in grammar, or a decided case upon the construction of a statute is a part of the statute, but each has a certain authority as a guide, and may not be unreasonably disregarded."

Expression once explained is used in the same sense throughout the Code.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Gender.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

9. Unless the contrary appear from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

Number.

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.

"Man." "Woman."

11. The word "*person*" includes any Company or Association or body of persons, whether incorporated or not.

"Person."

Person.—The subject to whom the law concedes the exercise of the will possesses legal capacity. The attribute of being such a subject constitutes personality. To be a person, is to possess the capacity to enjoy rights—to be the subject of rights. Modern law recognizes every human being as a person.

"Public."

12. The word "Public" includes any class of the public or any community.

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

"Queen."

14. The words "servant of the Queen" denote all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," or by or under the Government of India or any Government.

"Servant of the Queen."

15. The words "British India" denote the Territories which are or may become vested in Her Majesty by the said Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales' Island, Singapore, and Malacca.

16. The words "Government of India" denote the "Government of Governor General of India in Council, or India." during the absence of the Governor General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by them or him respectively.

17. The word "Government" denotes the person or persons authorized by law to administer executive Government in any part of British India.

18. The word "Presidency" denotes the Territories subject to the Government of a Presidency.

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations.

(a.) A Collector exercising jurisdiction in a suit under Act X of 1859, is a Judge.

(b.) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.

(c.) A Member of Panchayet which has power under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.

(d.) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

Illustration.

A Panchayet acting under Regulation VII, 1816, of the Madras Code, having power to try and determine suits, is a Court of Justice.

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely :—

First. Every covenanted servant of the Queen ;

Second. Every Commissioned Officer in the Military or Naval Forces of the Queen while serving under the Government of India, or any Government ;

Third. Every Judge ;

Fourth. Every Officer of a Court of Justice whose duty it is, as such Officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties ;

Fifth. Every juryman, assessor, or member of a Panchayet assisting a Court of Justice or public servant ;

A Member of a Panchayet appointed under the provisions of Act XX of 1856, is a public servant under the 5th and 10th descriptions, subordinate to this Section 21, Indian Penal Code (*Government v. Akbur Ali*, vol. V, Part II, p. 68, 1865, N. A., N. W. P.).

Sixth. Every arbitrator or other person to whom any cause or matter has been referred for decision or report

by any Court of Justice, or by any other competent public authority :

Seventh. Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth. Every Officer of Government whose duty it is, as such Officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience ;

Ninth. Every Officer whose duty it is, as such Officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every Officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty ;

Tenth. Every Officer whose duty it is, as such Officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town, or district.

Eleventh. Every Officer and servant of a Railway Company shall be deemed a public servant within the meaning of Sections 161, 2, 3, 4, 5, Indian Penal Code (Act XXXI, 1867).

Act XVIII of 1854 is the Railway Act. Section 39 of Act XVIII of 1854 was repealed by Section 1 Act XIV of 1870 and Schedule thereto attached.

Illustration.

A Municipal Commissioner is a public servant.

Twelfth. Every Pound Keeper shall be deemed a public servant under this Section (Act I of 1871, Section 6).

Thirteenth. Every Protector of Emigrants and every Medical Inspector of Emigrants shall be a public servant within the meaning of this Section (Act VII of 1871, Section 14).

Fourteenth. Every Registering Officer appointed under Act VIII of 1871 shall be deemed a public servant within the meaning of this Section (Act VIII of 1871, Section 82).

Explanation 1. Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2. Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

22. The words "movable property" are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth.

There is no definition given in this Code of the word *property*. "*Movable property*" is included in the word *property*, but *property* is more extensive than "*movable property*." Act XVIII of 1862 says the word *property* shall be understood to include goods, chattel, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed. Wharton in his Law Lexicon, at page 765, says property is of three sorts: absolute, qualified, and possessory. Property in reality is acquired by entry, conveyance, descent, or devise; and in personality, by many ways, but most usually by gift, bequest, or bargain and sale. Property is not a word of art. In the book of definitions, annexed to Mr. Livingstone's Code, it is said that the term "property conveys a compound idea composed of that which is its subject, and of the right to be exercised over it." We believe (say the Law Commissioners) that the term "property" is everywhere used in this Code, so as to be applicable exclusively to "that which is its subject." And so far as we have considered the provisions relating to "property," and the illustrations thereof, it does not appear to us that there is need for any explication of the term (1 Report, p. 28, para. 82)

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled :
"Wrongful gain."

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled :
"Wrongful loss."

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."
"Dishonestly."

"Dishonest taking" is when there is intention to cause either wrongful loss of property to owner or wrongful gain of property to another person. The taking need not be necessarily forcible, and it should be not only wrongful and fraudulent, but should also be without any colour of right. In regard to the dishonest intent of the prisoner there should be no doubt. To take property to which one is legally entitled from another is not a dishonest taking, although unlawful means may have been had recourse to to obtain the said property. (See some of the illustrations to Section 378, P. C.)

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.
"Fraudulently."

To defraud means to practise fraud ; and its meaning depends on the meaning of fraud, which is thus defined in "Tomlin's Law Dictionary" by Grainger : *deceit in grants and conveyances, in lands and bargains and sales of goods, &c., to the damage of another person*, which may be either by the suppression of the truth or by suggestion of falsehood,"—in which sense *fraudulently* means dishonestly (as defined in Section 24 *ante*) and at the same time deceitfully. The term *to defraud* in the English Statute has been held to be not merely to deceive or impose on a person by a false pretence (Reg. v. Williams, 7 Caus., 554) but to deprive a person by deceit of some known right, something to which he was legally entitled. Fraudulently, then, means something like dishonestly and deceitfully, in combination ; for a thing may be done dishonestly though not deceitfully, as where a robber takes by force (7 M. J., 362).

26. A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing, but not otherwise.

"Reason to believe."

27. When property is in the possession of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of this Code.

"Property in possession of wife, clerk, or servant."

Explanation.—A person employed temporarily, or on a particular occasion, in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

28. A person is said to "counterfeit," who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

"Counterfeit."

Explanation.—It is not essential to counterfeiting that the imitation should be exact.

29. The word "document" denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

"Document."

The definition in the Evidence Act I of 1872 is similar to this.

A writing which is not legal evidence of the matter expressed, may yet be a document within the meaning of this section, if the parties framing it believed it to be, and intended it to be evidence of such matter (2 B. L. R., Part VII, p. 12. *Queen v. Shifait Ali*).

Explanation 1.—It is immaterial by what means, or upon what substance, the letters, figures, or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A Cheque upon a Banker is a document.

A Power of Attorney is a document.

A Map or Plan which is intended to be used, or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.—Whatever is expressed by means of letters, figures, or marks, as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures, or marks within the meaning of the section, although the same may not be actually expressed.

Illustration.

A writes his name on the back of a Bill of Exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the Bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder," or words to that effect, had been written over the signature.

30. The words "valuable security" denote a document which is, or purports to be, a document "Valuable security." whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

By Section 124 and 25 Vic., c. 96, the term "*valuable security*" is defined to include any order, Exchequer acquittance, or other security whatsoever, entitling or evidencing the title of any person or body corporate to buy, share, or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any Foreign State; or in any fund of any body corporate, company or society, whether within the United Kingdom, or in any Foreign State or Country; or to any deposit in any bank, and also any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payments of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any Foreign State; and any document of title to lands or goods.

A settlement of accounts in writing, although not signed by any person is a "valuable security" within meaning of this section (2 Madras H. Ct. Reports, 247).

Held that the copy of a lease is not "a valuable security" within meaning of this section (Bo. H. Ct. Reports, vol. IV, Part II, p. 28, Reg. v. Khushal Hiranman). A deed of divorce is a "valuable security" within the meaning of this section (11 W. R. Cr. R., 16). (See note on Section 471.)

Illustration.

A writes his name on the back of a Bill of Exchange. As the effect of this endorsement is to transfer the right to the Bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

"A Will."

31. The words "a will" denote any testamentary document.

32. In every part of this Code except where a contrary intention appears from the context, words which refer to acts done extend also to legal (43) omissions.

Words referring to acts include illegal omissions.

"*Actus non facit reum nisi sit rea.*" The act itself does not make a man guilty, unless his intention were so also. It is a principle of natural justice and our law, that the intent and the act must both concur to constitute the crime. A man cannot be said to be guilty of a delict, unless, to some extent, his mind goes with his act (B. L. M., 301, 303, and 304). Nevertheless, a well-known maxim lays it down that "*acta exteriora indicant interiora secreta.*"

The law in England as to Criminal responsibility attaching to a person who, having the charge of another, provides him with insufficient food and so causes his death, is as follows: in order to sustain a charge of occasioning death by a mere *nonfeasance*, it must be shown not only that there was a duty to do the act omitted, but that the deceased was for some reason unable to provide for himself. It is undisputed law that if a person has the custody of another who is helpless, and leaves that other with insufficient food and so causes his death, he is criminally responsible. But it is also clear that, if a person, having the exercise of free will, chooses to stay in a place where he receives insufficient food and his health is injured, and death supervenes, the master is not criminally responsible (Per Erle C. J. in *R. v. Smith, L. & C.*, 607, 625; 34 L. J. (M. C.), 162). It will, however, be murder if the nonfeasance, though the principal cause of death, is combined with a *nonfeasance*, as where an apprentice died from harsh treatment *and* want of care on the part of his master while he was labouring under disease (*R. v. Squire*, 1 Russ., 426; Arch. Cr. Pl., 17th ed., 624; B. E. J., 178).

Criminal Law after all only embodies morality. If a criminal says that he has no evil intention, it may only be because in fact he has no sense of morality. What the law says is, we regard not *your* views of morality, but we act upon what mankind has agreed to consider morality. Experience has settled that the fact of the destruction of life having been brought home to you, we presume that you performed those actions with a clear knowledge of what would come of them—namely death—and therefore unless you can rebut this presumption, this is malicious, that is, a wicked and deliberate intent to destroy life. A man *may say* when he plunges a knife into another man that he did not intend to kill him, but the law cannot

suppose such elementary ignorance, as that a pistol-shot or a dose of prussic acid will not destroy life. Life is as certainly destroyed by withholding food (*an illegal omission*) i.e. starvation, as by a poker or a bludgeon. You *must* have known, or at any rate if you did not know, such ignorance was criminal, that what you were doing could only end in death, and that is murder. Probably you did not know what intention was, but in many cases of murder there is an equal absence of intention, in so far as the word has any meaning. It point of fact it about resolves itself into this—that this absence of intention, in your use of the word, is of the essence of murder. You did not intend to destroy life, only you abstained from the only means by which life can be preserved. You ought to have had an intention to preserve life. Not to have it is to intend murder (*Saturday Review*, 15th October, 1870).

33. The word “act” denotes as well a series of acts as a single act: the word “omission” denotes as well a series of omissions as a single omission.

The word *act* includes *writing* and *speaking* (see Commissioners’ Report on P. C.), and with reference to what act or acts constitute an offence, Section 40 *post* should be borne in mind; also the fact that the act or acts or combination of acts must be the result of, and accompanied by, a fraudulent and corrupt intention. Every operation of the will upon the external world is denominated an act. It is only such, only overt acts that are termed juridical. Acts are divisible into positive acts, or acts, of commission; or negative ones, or acts of omission; allowable, and forbidden or delicts; possible and impossible. Every juridical act presupposes the capacity of volition, or the direction of the will to a given end (resolve) and the manifestation or declaration of the same (T. and J. M. R. L., 66). Mr. Stephens, in his work on English Criminal Law, says, “An action consists of voluntary bodily motions combined by the mind towards a common object. Intention is in every case essential to crime, because it is essential to action, and every crime is an action, as appears from the use of active verbs in every indictment. No action is criminal in itself unless the intent, the mental element of it, is a state of mind forbidden by the law. In short, in order to be a crime, an action must not only be intentional in the general sense already explained, but it must be accompanied with a specific intention forbidden by the law in that particular case.”

34. When a criminal act is done by several persons in furtherance of the common intention of all, each (35), (37) of such persons is liable for that act in the same manner as if the act were done by him alone.
- Each of several persons liable for an act done by all in like manner as if done by him alone.

This section was substituted by Section 1, Act XXVII of 1870. In
C

this section the words "in furtherance of the common intention of all" have been introduced by the amending Act, so as to make the object of the section clear.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

Intention.—A person who does an act wilfully, and in legal contemplation, intends that which must be the consequence of his act, or that which the experience of mankind shows will be the probable consequence of his act. It may be that he really never contemplated, wished, or intended such consequence to arise; but still, if the consequences are the probable consequences, the law says that he intended to bring them about. It is impossible to tell the precise thought or intention existing in a person's mind at the time he does an act, therefore the law says that a person intends the probable consequences of his act.

36. Whenever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood the causing of that effect partly by an act and partly by an omission is the same offence.

Effect caused partly by act and partly by omission.

Illustration.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Co-operation by doing one of several acts constituting an offence.

Illustrations.

(a.) A and B agree to murder Z by severally, and at different times, giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each

of them does an act by which the death is caused, they are both guilty of the offence, though their acts are separate.

(b.) A and B are joint Jailors, and as such have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(c.) A, a Jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food, in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause the death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder; but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Several persons engaged in the commission of a criminal act may be guilty of different offences.

Illustration.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

39. A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which at the time of employing those means he knew or had reason to believe to be likely to cause it.

"Voluntarily."

Illustration.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet if he knew that he was likely to cause death, he has caused death voluntarily.

This definition of the term "voluntarily" agrees pretty nearly with the definition of the term "wilfully" in the Digest prepared by the Commissioners on the Criminal Law of England. In article 2, Section 3, Chapter I,

it is laid down that "A hurt, damage, or other evil consequence of an act, shall be deemed to have been caused *wilfully* when the doer of the act *intended* such consequence to result, or *knew or believed that it was likely* to result from his act, or when knowing or apprehending that such consequence would *probably* result from his act, he wilfully incurred the risk of causing it." This definition differs from that of the Law Commissioners only in having a third branch or member besides the two contained in the latter, namely, the knowledge or apprehension that the effect or consequence in question would *probably* result from the act done (1 L. C. R., 36).

40. Except in the chapter and sections mentioned in Clauses II and III of this section, the word "offence." denotes a thing made punishable by this Code.

In Chapter IV and in the following sections,—namely, Sections 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined :

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law, is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

Austin on Law of Things divides events which are causes of rights and duties in the following manner, viz.: into acts, forbearances, and omissions which are violations of rights or duties, and events which are *not* violations of rights or duties. Acts, forbearances and omissions which are violations of rights or duties, are styled *delicts*, *injuries*, or *offences*. Rights and duties *not* arising from delicts, he distinguishes from rights and duties which are consequences of delicts by the name of *primary* (or principal). Rights and duties arising from delicts he distinguishes from the former by the name of sanctioning (or secondary); and distributes the matter of the Law of Things under two capital departments. (1.) *Primary* rights with *primary* relative duties. (2.) *Sanctioning* rights with *sanctioning* duties (relative and absolute), *delicts* or *injuries* (the causes and antecedents of sanctioning rights and duties) included (Aust. Jur., vol. I, preface LXXV). Duties are relative or absolute. A relative duty is implied by a right to which that duty answers. An absolute duty does not answer or is not implied by an answering right, e.g. a duty to forbear from cruelty to any of the lower animals (*id.* CIV).

The term "thing" in this section with reference to the word "*offence*" means a thing made punishable under this Code, and not each time of the doing of a thing made punishable by the Code; it refers to classes of acts, not repetitions of one class of acts, otherwise what is the meaning of specially referring to Section 72 Penal Code in Section 381 Act XXV of 1861?

The "*thing*" made punishable by this Code denoted by the word "*offence*" must be an act or acts or combination of acts accompanied by, and the result of, a fraudulent and corrupt intention. "To constitute a crime against human laws, there must be, first, a vicious will, and secondly, an unlawful act, consequent upon such vicious will (Blackstone.)

"The distinction of public wrongs from private, of crimes and misdemeanours from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs or crimes and misdemeanours are a breach and violation of the public rights and duties due to the whole community in its social aggregate capacity. In all cases the crime includes an injury; every public offence is also a private wrong, and somewhat more; it affects the individual and it likewise affects the community" (Black. Com., vol. IV, pp. 4 and 6). In a general sense, crimes are such transgressions of law as are punishable by Courts of Justice. The perpetrator of a crime is liable to punishment on grounds of public policy, besides being bound to repair, where that is possible, the injury sustained by the individual. For minor offences the term *delict* is sometimes used. By Roman Law crimes were divided into private and public. Private crimes could be prosecuted only by the party injured, and were generally punished by pecuniary fines applied to his use. Some offences which we are accustomed to regard as public crimes, such as theft and robbery, were treated as civil wrongs, in the same manner as trespass and slander. All these were usually requited by payments in money; and the same peculiarity is observable in the early laws of the Germans. Ordinary public crimes were those expressly declared to be such by some law or ordinance, and which, on account of their atrocious or hurtful character, might be prosecuted by any member of the community. Some public crimes were called extraordinary when the nature of the punishment was not defined by any specific law, but was left to the discretion of the Judge. Of this description were violating a tomb, removing landmarks, forcing prisons, sheltering and abetting thieves, stallionate and a great variety of innumerate offences (Mack. R. L., 338). I have given Blackstone's definition of the difference between public and private wrongs. The following is Austin's: where the wrong is a civil injury, the sanction is enforced at the instance of the injured, or of his representative; and that the liability of the offender (if remissible at all) is remissible by the injured party, and not by the Sovereign or State. *Observe*: that since the direct object of civil procedure is satisfaction to the injured rightee, no heed can be given to the disposition of the wrong-doer. Where the wrong is a *crime* the sanction is enforced at the discretion of the Sovereign. And accord-

ingly the same wrong may be private or public, as we take it with reference to one or another sanction. Considered as a ground of action on the part of the injured individual, a battery is a civil injury. The same battery, considered as a ground for an indictment, is a crime or public wrong. By discretion of the Sovereign or State, is meant the discretion of the Sovereign or State as exercised according to law Aust. Jur., vol. II, p. 190).

For the old Section 40 (which defined "offence") has been substituted by Section 2 Act XXVII of 1870, a section founded on Act IV of 1867, Section 1. This new section declares that the word "offence" shall, not only in the sections mentioned in Act IV of 1867, Section 1, but also in Chapter IV of the Code, include a thing punishable under a special or local law.

"Special Law." 41. A "special law" is a law applicable to a particular subject.

"Local Law." 42. A "local law" is a law applicable only to a particular part of British India.

43. The word "illegal" is applicable to every thing "Illegal." "Legally which is an offence, or which is prohibited bound to do." by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

"*Executio Juris not habet injuriam.*" "The law will not in its executive capacity work a wrong." It was one of the Rules of the Romans, as it is of our own law, that if an action be brought in a Court which has jurisdiction, upon insufficient grounds or against the wrong party, no injury is thereby done for which an action can be maintained. But if an individual, under the colour of law, does an illegal act, or if he abuses the process of the Court to make it an instrument of oppression or extortion, this is a fraud upon the law by the commission of which liability will be incurred. (See the leading case illustrative of this proposition given at page 132 of Broome's Legal maxims; also *in re Jamain v. Hooper*, and *Davies v. Jenkins*, and *Green v. Elgin*, p. 134. *id.*) In cases similar to these, the maxim as to *executio juris* is not, in truth, strictly applicable, because the proceedings actually taken are *not* sanctioned by law, and therefore the party taking them, although acting under colour of legal process, is not protected (B. L. M., 135).

44. The word "injury" denotes any harm whatever "Injury." illegally caused to any person in body, mind, reputation, or property.

A *wrong* or *injury* is an act, forbearance, or omission of such a character that the party is guilty, and to be *guilty* is to have acted, forborne, or omitted in such a wise that the act, forbearance, or omission is an *injury* or *wrong*. Intention, negligence, heedlessness, or rashness is an *essentially component part* of injury or wrong. Injury or wrong supposes unlawful *intention*, or one of those modes of unlawful *inadvertence* which are styled negligence, heedlessness, and rashness. (See Aust. Jus. L. ce's xxiv. xxv. analyzing Injury or Wrong.)

Under the Roman law *Injuria* was used in three senses. (1.) A wrongful act, an act done *nullo jure*. (2.) The fault committed by a judge who gives judgment not according to *jus*. (3.) An outrage or affront—*Generalitèr injuria dicitur omne quod non jure fit*. *Injuria* in its *general* sense signified every action contrary to law; in a *special* sense it meant sometimes the same as *contumelia* (outrage) derived from *contemnere*, sometimes the same as *culpa* (fault), sometimes in the sense of iniquity, injustice. In every case of injury he who had received it might bring either a criminal or a civil action. In the latter an estimated sum constituted the penalty, in the former the judge, in the exercise of his duty, inflicted on the offender an extraordinary punishment.

With reference to clear exposition of the Modern Roman Law on *obligations arising out of delicts and cognate cases*, *Furtum*, *Damnum*, *Injuria*, *Contumelia*, and the actions that lie, see T. and J. M. R. L., Section 52, pp. 380—396.

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.
"Life."

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.
"Death."

47. The word "animal" denotes any living creature other than a human being.
"Animal."

48. The word "vessel" denotes any thing made for the conveyance by water of human beings, or of property.
"Vessel."

The definition of a "vessel" in Section 3 Act VII of 1871, the Emigration Act, is similar to this.

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British Calendar.
"Year."

50. The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

"Section."

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a Court of Justice or not.

"Oath."

52. Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

"Good Faith."

Compare with Section 166 and note thereon.

The legal meaning of *bonâ fide* is with due care and after due inquiry (11 W. R., 389).

CHAPTER III.

OF PUNISHMENTS.

"*Punishment*" Blackstone defines as evils or inconveniences consequent upon crimes and misdemeanours; being devised, denounced and inflicted by human laws, in consequence of disobedience or misbehaviour in those to regulate whose conduct such laws are respectively made. The end or final cause of human punishments is as a precaution against future offences of the same kind. This is effected in three ways: either by the amendment of the offender himself, for which purpose all corporal punishments, fines and temporary exile or imprisonment are inflicted; or by deterring others by the dread of his example from offending in the like way, "*ut pœna ad paucos, metus ad omnes, perveniat*," which gives rise to all ignominious punishments, and to such executions of justice as are open and public; or lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death or condemning him to perpetual confinement or exile (Black. Com. vol. IV., pp. 7 to 10). It is the sentiment of an ingenious writer, that crimes are more effectually prevented by the *certainty* than by the *severity* of the punishment (*id.*, p. 15).

And Austin, at p. CV of the preface to his Jurisprudence talks of "those consequences of crimes which are styled, strictly and properly, *punishments*." (See 1 Aust. Jur., 92; also Lecture XXVII, p. 524; also Stephen's Criminal Law of England, p. 5.)

In addition to the punishments described in this section, P. C., offenders are also liable to whipping under the provisions of the said Code (Section 1, Act VI of 1864).

53. The punishments to which offenders are liable under
"Punishments." the provisions of this Code are—

Firstly,—Death ;

Secondly,—Transportation ;

Section 22 Act V of 1871 lays it down that "All Acts and Regulations now in force within British India, with respect to convicts under sentence of transportation, or under sentence of imprisonment with hard labour shall so far as may be consistent with the express provisions of the Prisoners' Act (V of 1871) be construed to apply to persons under any sentence of penal servitude.

Thirdly,—Penal servitude ;

Every person sentenced to penal servitude—where to be sent, and how to be dealt with, provisions regarding intermediate imprisonment, and the time of such intermediate imprisonment to count in discharge of sentence—are to be found at *Section 21 Act V of 1871*. For powers of granting ticket of leave see *Section 23 (id.)*. Holder of license to be allowed to go at large, *Section 24 (id.)*. Apprehension of the convict on revocation of licence, *Section 25 (id.)*.

Fourthly,—Imprisonment, which is of two descriptions—namely :—

(1.) Rigorous, that is, with hard labour.

Hard labour consists chiefly in grinding corn, oil pressing, soorkhee pounding, paper pounding and polishing, digging and carrying earth, drawing water, cutting firewood, latrine work, bowing wool, blacksmith's work, &c.

(2.) Simple.

"Simple imprisonment" under the P. C. means nothing more than confinement in Jail, subject to the Jail rules as to diet, &c., and prisoners undergoing such a sentence cannot be lawfully put to any work against their will (J. C., Oudh, Book Circular 3, 1865).

Fifthly,—Forfeiture of property.

Forfeiture (says Blackstone, vol. II, p. 261) is a punishment annexed

by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments : whereby he loses all his interest therein, and they go to the party injured, as a recompense for wrong which either he alone, or the public together with himself has sustained.

Sixthly,—Fine.

The reference to Section 53 Penal Code in Section 1 Act VI of 1864, is simply that whipping is to be added to the list of punishments described in this Section 53, not that it may be an additional punishment in the case of each offence punished.

54. In every case in which sentence of death shall have been passed, the Government of India (5) (16), or, the Government of the place (3) (17) within which the offender shall have been sentenced, may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Commutation of sentence of death.

For the definition of the legislative powers of the Government of India when Penal Code was passed, see 3rd and 4th Wm. IV, chap. 85.

Government is here given a power of commuting sentences in certain cases without consent of the offender. It is evidently fit that Government should be empowered to commute the sentence of death for any other punishment provided in the Code. It is very desirable also that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances, of which the executive authorities ought to be accurately informed, but which may often be unknown to the ablest Judge, may at particular times render it highly inconvenient to carry a sentence of transportation into effect (Note A. on Chapter Punishments by Law Commissioners).

By the C. C. P., the Governor-General in Council or the Local Government may, at any time, without conditions, or upon any condition which such person shall accept, remit the whole or any part of the punishment to which he shall have been sentenced, when any person has been sentenced to punishment for an offence.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India, or the Government of the place within which the offender shall have been sentenced, may without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Commutation of sentence of transportation for life.

Vide note on Section 54.

56. Whenever any person being a European or American is convicted of an offence (40) punishable under this Code with transportation, the Court (H. Ct.) shall sentence the offender to penal servitude instead of transportation, according to the provisions of Act XXIV of 1855.

Europeans and Americans to be sentenced to penal servitude instead of transportation.

Section 1 Act XXIV of 1855, runs as follows: "After the commencement of this Act, no European or American shall be liable to be sentenced or ordered, by any Court within the territories in the possession and under the Government of the East India Company, to be transported. Act V of 1871, Section 2, and Schedule attached to the said Act, repeals Sections 5, 6, 7, 9, 10, 11, and 12 of Act XXIV of 1855, and Section 16 was repealed by Section 1 Act XIV of 1870, and Schedule, Part II, thereto attached.

Provided that where a European or American offender would, but for such act, be liable to be sentenced or ordered to be transported for a term exceeding ten years, but not for life, he shall be liable to be sentenced or ordered to be kept in penal servitude for such term exceeding six years as to the Court seems fit, but not for life.

Proviso as to sentences for term exceeding ten years, but not for life.

The proviso to this Section was added by Section 3 Act XXVII of 1870.

Section 56 enacts that Europeans and Americans shall be sentenced to penal servitude instead of transportation, "according to the provisions of Act XXIV of 1855." This Act provides (Section 2) that, instead of a term of transportation not exceeding ten years, penal servitude not exceeding *six* years shall be inflicted; and instead of a term of transportation not exceeding fifteen years, penal servitude not exceeding ten years. Now, under the Code the Courts can award transportation for a term exceeding ten years, but short of life, under five Sections only,—namely, Sections 115, 222, 392, 457, and 458. The result is, practically, that, in the case of the vast majority of European and American offenders, the Courts have no option between awarding a sentence of penal servitude for six years and awarding one of penal servitude for life. The amending enactment removes this defect by declaring in the proviso added to Section 56, that where such an offender would, but for Act XXIV, be liable to transportation for such a term not exceeding ten years, but not for life, he shall be liable to penal servitude for such term exceeding six years, but not for life, as to the Court seems fit.

As great difficulties were experienced in England in finding Colonies willing to receive transported convicts, penal servitude was substituted for transportation under Acts XVI and XVII Vic., c. 99, and XX and XXI Vic.,

c. 3. Any of the Principal Secretaries of State may grant licenses to be at large to convicts under sentence of penal servitude, but if the license of any convict be revoked, he may be committed to prison, and compelled to undergo the residue of his sentence (Mack. R. L., 365).

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

Fractions of terms of punishment.

Under Sections 376 and 511, P. C. a sentence of ten years' *transportation*, or five years' *rigorous imprisonment*, may be passed for the attempt to commit rape; but a sentence of seven years' rigorous imprisonment, commutable, under Section 59 of P. C., to seven years' transportation, is illegal (10 W. R., 10).

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of imprisonment.

Offenders sentenced to transportation how to be dealt with until transportation.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.

In what cases transportation may be awarded instead of imprisonment.

Under Section 59, P. C., no sentence of transportation for a shorter period than seven years can be passed on any charge. Therefore, where a prisoner was convicted on separate charges of giving false evidence in a judicial proceeding under Section 193, and forgery under Section 467, and sentenced to seven years' transportation for the first offence, and a further period of transportation for three years for the second offence, the second sentence was quashed as illegal (8 W. R., 2).

By terms of this section, in passing sentence of transportation in cases in which imprisonment is awarded for seven years or upwards, the correct mode of proceeding is to sentence the offender to transportation, mentioning at the same time, that under this Section 59 such transpor-

tation is awarded instead of imprisonment (Circular No. 9, High Court, Calcutta, 1866).

This section will not apply to any sentence unless that particular sentence be one of imprisonment for more than seven years (3 W. R., 44).

This section lays down that, in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, the Court, in sentencing such offender, may award transportation instead of imprisonment. The words contained in this section allude to offenders and to offences, and an offender may be one who commits several offences. But the restriction on the first clause of the section is to be found in the concluding clause in the words "The Court which sentences such offender, instead of awarding imprisonment, may sentence to transportation." The Code of Criminal Procedure lays down that the Court must pass sentence for each offence separately. If this Procedure is observed, a Court can sentence to transportation only in a case in which an offence is punishable with a term of seven years. It may, in passing sentence for the offence, commute the imprisonment to transportation. It cannot commute the sentence after a sentence of imprisonment has been passed, and it follows, cannot commute it at all, except for offences for which the law awards seven years' imprisonment or upwards.

60. In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence, that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

Sentence may be, in certain cases of imprisonment, wholly or partly rigorous or simple.

In 1862, the Madras High Court in their Rules held that the period of imprisonment under the sentence of a Criminal Court was to be calculated from the date on which such sentence was passed. The period during which a sentence might be suspended pending appeal was not to be reckoned in calculating the term of imprisonment if the appeal was rejected.

61. In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government (17), until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.

Sentence of forfeiture of property.

Illustration.

A, being convicted of waging war against the Government of India, is liable to forfeiture of all his property. After the sentence, and whilst it is in force, A's father dies, leaving an estate which, but for the forfeiture, would become the property of A. The estate becomes the property of Government.

"The effect of this section," says Mayne in his Penal Code, 3rd Edition, "is to combine for the benefit of the Crown the English doctrines of forfeiture and escheat. Forfeiture only took place in reference to property vested in the criminal at the time." "But the law of escheat followed the matter still further." For the blood of the tenant being utterly corrupted and extinguished, it followed not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future (1 Steph. Com., 418). (See Mayne, p. 23).

62. Whenever any person is convicted of an offence (40) punishable with death the Court may adjudge that all his property, movable (22) and immovable, shall be forfeited to Government (17); and whenever any person shall be convicted of any offence for which he shall be transported, or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rents and profits of all his movable and immovable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependents as the Government may think fit to allow during such period.

Forfeiture of property in respect of offenders punishable with death, transportation, or imprisonment.

Where a zemindar was convicted of wrongfully keeping in confinement a kidnapped person, and was sentenced to transportation by the Sessions Judge, who added a sentence of forfeiture of the rents and profits of the prisoner's estate under this section, the High Court, Calcutta, set aside the sentence, under Section 62, P. C., as too severe. That sentence should be inflicted for offences of the most atrocious kind, or for offences committed under the most aggravated circumstances (12 W. R., 17. *Queen v. Mahomed Akhri alias Totah Meeah*).

The forfeiture of property herein referred to when ordered by the Court is a part and parcel of the sentence adjudged by the Court, and it is optional with the Court to add forfeiture to the punishment of death or transportation for life.

With reference to forfeiture of pensions in cases of felony, the Advocate General, on a reference from the Supreme Government, gave his opinion to the effect "That when a pensioner, convicted and sentenced to

transportation for life, or to suffer the extreme penalty of the law, transfers his pension to his heirs, or nearest relative, it is optional to Government to continue to grant him or her the allowance; but when he is sentenced to incarceration for a limited period, he is not to forfeit his pension which he has earned by length of service" (*Vide* Bombay Gazette of 7th February, 1871, and Summary of the Pioneer of 9th March, 1871).

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

Amount of fine.

Section 5 of the General Clauses Act runs as follows. "The provisions of Sections 63 to 70, both inclusive, of the Indian Penal Code and Section 61 C. C. P. (XXV of 1861 and VIII of 1869) shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary."

64. In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine (70), the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence.

Sentence of imprisonment in default of payment of fine.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Limit of term of imprisonment for default in payment of fine when the offence is punishable with imprisonment as well as fine.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence (40).

Description of imprisonment for such default.

67. If the offence be punishable with fine only, the

Term of imprisonment for default in payment of fine, when the offence is punishable with fine only.

term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale : that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

Such imprisonment to terminate upon payment of the fine.

69. If before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied, that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Termination of such imprisonment upon payment of proportional part of fine.

Illustration.

A is sentenced to a fine of one hundred rupees, and to four months' imprisonment in default of payment. Here, if seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than

Fine may be levied within six years, or at any time during the term of imprisonment.

Death of offender not to discharge his property from liability. six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

A fine imposed under a special or local law is not subject to the operation of this section unless the latter be specially extended thereto (5 R. J. P. J., 213).

Imprisonment in default does not relieve from payment of fine (5 R. J. P. J., 37). This ruling is evidently based on the principle laid down by the Commissioners in their report, in which they say—"We do not mean that this imprisonment shall be taken in full satisfaction of the fine; we cannot consent to permit the offender to choose whether he will suffer in his person or his property;" and a little further on they say—"The imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine, but his property will for a time continue to be so." N.B.—No imprisonment in default of fine imposed under salt laws (5 R. J. P. J., 100). This refers to the Lower Provinces only. Act XIV of 1843 imposes imprisonment in default.

71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than any one of such offences, unless it be so expressly provided.

Limit of punishment of offence which is made up of several offences.

(a.) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b.) But if while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to A, and another for the blow given to Y.

When all the facts in evidence form portion of one entire offence, verdict should be entered, and sentence passed for that offence only; and though a portion of the same facts would if they stood alone constitute a second offence, a verdict of "*not guilty*" should be entered on any separate charge for the minor offence: *e.g.*, A is charged and found guilty on the evidence of theft; the fact of stolen property being found in his possession must be considered as a portion of the evidence by which theft is proved, and a verdict of not guilty be entered on the charge of disho-

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nestly receiving stolen property (1 W. R. Cr. Cir. 16, 1864). And for further illustrations of the above principle, see *Queen v. Ruberoolah*, 7 W. R. C. R., 13; *Queen v. Tonakoch*, 2 W. R. C. R., 63; *Queen v. Massahur Daoud*, 6 W. R. C. R., 63; *Queen v. Chyton Bowrah*, 5 W. R. C. R., 49; *Queen v. Bhulloo Dome*, 9 W. R. C. R., 5; *Queen v. Mothee Kora*, 2 W. R. C. R., 1., and several other cases.

This section applies to the case of a person charged with "house breaking" under Section 457 *post*, and "theft" committed on the same occasion under Section 380 *post*.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of those offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.

Punishment of a person found guilty of one of several offences, the judgment stating that it is doubtful of which.

This section clears away a difficulty which previously had been without redress, and until comparatively a very recent time many offenders escaped punishment altogether, even under the law of England, by reason of failure of proof that *the* offence was committed or really completed; there was no alternative, the offender was entitled to acquittal, and justice was defeated. This has now been altered at home, and by the provisions of this section a prisoner may be found guilty upon some one of the counts, the Court being doubtful under which particular count notwithstanding, and the offender shall be punished for that offence for which the lowest punishment is provided. The doubt "referred to" must relate to some incidental point which is of a quality important only as determining whether the offence falls technically under one designation or another—*e. g.*, theft or criminal breach of trust. Notwithstanding the difficulty cleared away by the precise wording of this section, a doubt exists whether a person can be charged and found guilty, in the alternative in one charge containing two counts, of having committed the offence of giving false evidence in respect to the same matter, either on one occasion alleged on the first count or on another occasion alleged in the second count; and whether if that be so the mere proof of the two contradictory statements is sufficient evidence of the offence, or, if not, what other elements should be taken into consideration before a conviction can be got; this doubt is owing to a certain amount of confusion in the authorities and to some of the leading cases having been encroached upon by later decisions (*vide* decisions given under section 193 *post*, and this point as argued in *Madras Jurist*, vol. VI, 41 to 64).

73. Whenever any person is convicted of an offence for

Solitary confinement, which under this Code the Court has C. C. P. power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say :—

A time not exceeding one month, if the term of imprisonment shall not exceed six months.

A time not exceeding two months, if the term of imprisonment shall exceed six months and be less than a year.

A time not exceeding three months, if the term of imprisonment shall exceed one year.

Solitary confinement cannot be awarded where imprisonment does not form part of the *substantive* punishment awarded (4, P. R., 37).

The Inspector General of Prisons, Oudh, reported that practically solitary confinement had a very deterrent effect; the Judicial Commissioner, Oudh, accordingly issued his Book Circular 25, dated 18th August, 1869, requesting officers to avail themselves more freely of the provisions of this section.

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Punishment of persons convicted, after previous conviction, of an offence punishable with three years' imprisonment.

75. Whoever, having been convicted of an offence (40) punishable under Chapter XII (offences relating to coin and Government stamps), or Chapter XVII (offences against property), of this Code with imprisonment of either description for a term of three years

or upwards, shall be guilty of any offence punishable under either of those Chapters with the imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life, or to double the amount of punishment to which he would otherwise have been liable for the same : Provided that he shall not in any case be liable to imprisonment for a term exceeding ten years.

A Magistrate is not bound to commit a person accused under Sections 380 and 457, Penal Code, because he has been previously convicted under Chapter XVII, Penal Code. He can, if he thinks fit, pass sentence within his competence ; because the schedule attached to C. C. P. does not provide that persons punishable under Section 75 of Penal Code are to be tried by any other Court than that which would have had jurisdiction over the offence, if there had not been any previous conviction (2 R. J. P. J., 109). These remarks must be read as modified by Section 315, C. C. P. (he shall ordinarily, if the Magistrate considers him an habitual offender, be committed to the Court of Session).

The pith of this section appears to lie in the words "to double the amount of punishment to which he would *otherwise* have been liable for the same."

A commits theft in a house in January, 1865, and taking all circumstances into consideration, you consider him worthy of six months' imprisonment. In January, 1867, A again commits theft ; this time, say, under Section 379, Penal Code. You can, under provisions of this section give him a year, though, had it been his first offence, you might have only given him six months. It would appear that this section was framed with a view to giving a Sessions Judge power to get rid of a confirmed bad character by giving him a good long imprisonment or transportation for life.

An offender after having been convicted for a crime under Chapter XVII, again commits a similar description of crime, or a crime punishable under the same chapter, is liable under this section to enhanced punishment ; but when no punishment under it has yet been undergone, and no time has been given for reformation, it cannot be said that a prisoner has had any opportunity of showing what the effect of the first sentence would have been upon him (1 R. C. C. R., 60).

A man convicted of an offence punishable under Chapters XII and XVII of this Code prior to 1st January, 1862, would not, on a second conviction subsequent to that date, be liable to any enhanced punishment under this Section 75, the provisions of this section not being applicable to convictions made prior to the Penal Code coming into operation (2 R. J. P. J., 109 ; also 4 W. R., 9).

N.B.—It is not necessary that a person should actually have undergone imprisonment for three years ; as long as the *offence* of which he has been convicted is *punishable* with imprisonment for a term of three years, he

comes under the provisions of this Section 75. In fact this section does not require that any punishment of imprisonment *should be* suffered; for instance, a prisoner may have been previously convicted of theft, and whipped, and when subsequently convicted under Chapter XVII is liable to the enhanced punishment provided by this section.

A Sessions Judge cannot (under this section or otherwise) by amalgamating a sentence which he is competent to pass upon a prisoner with a sentence under which such prisoner is already undergoing imprisonment, and commuting the latter sentence, condemn such prisoner to a longer period of transportation than he is liable to suffer for the crime of which he has been convicted (Reg. v. Sakgà, Bo. H. Ct. R., Crown cases, p. 36, of 1868.)

CHAPTER IV.

GENERAL EXCEPTIONS.

By Section 2 Act XXVII of 1870, the word "offence" in this Chapter IV, Penal Code, denotes a thing punishable under this Code or under any special or local law as defined in Sections 41, 42, *ante*.

This chapter has been passed to obviate the necessity of repeating in every penal clause a considerable number of limitations. With the exception of one or two limitations, which limitations are, as a rule, appended to the sections which they are intended to modify, there are other exceptions in favour of infants, lunatics, idiots, persons under the influence of delirium; exceptions in favour of acts done by the direction of the law; of acts done in the exercise of the right of self-defence; of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page, they have, therefore, been placed in a separate chapter, and it has been provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in this chapter (Note B., Indian Law Commissioners, 79, 80).

76. Nothing is an offence (40) which is done by a person who is, or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith (52) believes himself to be, bound by law to do it.

Act done by a person bound, or by mistake of fact believing himself bound, by law.

Where a person whom a chowkeydar attempted to arrest as a thief,

made a desperate resistance, it was held that the chowkeydar was justified in using such violence as was necessary to arrest him.

Even if the chowkeydar was wrong in supposing him to be a thief, the mistake was one of *fact*, and not a mistake of *law*, and the chowkeydar would be entitled to the benefit of this Section 76 and Section 79 of this Code (*In re Protaub, Chowkeydar*, 16th January, 1865, 4 R. J. P. J., 165).

A prisoner who was a servant of the Port Canning Company, finding some fishermen poaching on his masters' fisheries, and acting *bonâ fide* in the interest of his employers, took possession of the nets, and refused to give them up to the Police. He retained possession of them, pending the orders of his employers. The taking of the nets not being criminal he was held not guilty of the theft charged (*Queen v. Nobin Chunder Halder*, 6 W. R., 79).

Illustrations.

(a.) A, a soldier, fires on a mob by the order of his superior Officer, in conformity with the commands of the law. A has committed no offence.

(b.) A, an Officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.

77. Nothing is an offence (40) which is done by a Judge
Act of Judge when acting judicially. (19) when acting judicially in the exercise
 of any power which is, or which in good
 faith (52) he believes to be, given to him by law.

Act XVIII of 1850 enacts that no civil action lies against a Judge acting judicially for anything done or ordered to be done by him in good faith.

De fide et officio Judicis non recipitur quæstio sed de scientiâ sive sit error juris sive facti. The *bonâ fides* and honesty of purpose of a Judge cannot be questioned, but his decision may be impugned for error either of law or fact. This maxim attaching to persons filling judicial offices and discharging functions appertaining thereto, is one that has been uniformly maintained. "The doctrine," says Mr. Chancellor Kent, "which holds a Judge exempt from a civil suit or indictment for any act done or omitted to be done by him sitting as judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions,—amidst every change of policy, and through every resolution of the Government,—of the English Courts. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice." This freedom of action and question at the suit of an individual is given by our law to the Judges, not so much for their own sake as for the sake of the public, and for the

advancement of justice, that, being free from actions, they may be free in thought and independent in judgment, as all who administer justice ought to be (B. L. M., 88, 4th Edn.).

78. Nothing which is done in pursuance of, or which is warranted by, the judgment or order of a Court of Justice (20), if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act (33) in good faith (52) believes that the Court had such jurisdiction.

Act done pursuant to the judgment or order of a Court of Justice.

Persons acting beyond jurisdiction are not protected by this section. The protection is *cundo, morando, et redeundo* (5 R. J. P. J., 43). So also in a case where a bailiff, in executing process against the movable property of a judgment-debtor, broke open the gate (3 R. C. C. Cr. 8).

The arrest under civil process of a judgment-debtor going to a Court in obedience to a citation to give evidence, and made within the precincts of that Court, and with some show of violence and contempt of Court, does not entitle the officers making the arrest to protection under this section (3 W. R., 53, Thackordoss Nundy v. Shunkur Roy).

79. Nothing is an offence (40) which is done by any person (11) who is justified by law, or who, by reason of a mistake of fact, and not by reason of a mistake of law, in good faith (52) believes himself to be justified by law in doing it.

Act done by a person justified, or by mistake of fact believing himself justified, by law.

Illustration.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

A mistake of fact.—Although the *proximate* ground is ignorance, the *ultimate* ground is the absence of unlawful intention, or unlawful inadvertence (see 25 Aust. Jur., 495, and examples there given). The admission of ignorance of *fact* as a ground of exemption, is not attended with those inconveniences which would seem to be the reason for rejecting ignorance of *law* as a valid excuse. Whether the ignorance really existed, and whether it was imputable or not to the inadvertence of the party, is a question which may be solved by looking at the circumstances of the case. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is therefore not interminable (*id.* 499).

Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law (1 Hale, 42). The rule contained in this section proceeds upon a supposition that *the original intention was lawful*; for if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequence may ensue (4 Black. Com., 27; see also note under head of *Accident* under Section 80, *post*). The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a *crime or liability upon a contract*. Therefore there are clearly cases in which acts done in ignorance of the law are valid acts which will be upheld by the Courts. The meaning of the word *jus* in the maxim *ignorantia juris neminem excusat* was explained by Lord Westbury, in *Cooper v. Phibbs*: "When the word *jus* is used in the sense of denoting a private right this maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relation and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake." The application of this maxim is clearly not so stringent as is commonly supposed.

80. Nothing is an offence (40) which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, with proper care and caution.

Accident in the doing
of a lawful act.

Under English law, a person causing death by an act heedlessly and incautiously done, is guilty of manslaughter (Roscoe, 644).

If a man do any act, however unfortunate in its consequences, through accident, error, or ignorance, without any criminal intention or knowledge, he is not guilty of an offence: the ignorance herein implied is an ignorance or mistake of fact, not an ignorance or mistake of law (see Section 76, *ante*). Ignorance of the law excuses no man, for every one is *presumed* to know it, as is shown by the maxim "*Ignorantia facti excusat—Ignorantia juris non excusat*" having become a fundamental legal principle; but with reference to this principle, it is necessary to bear in mind, that, though ignorance of the law does not excuse persons, so as to exempt them from the consequences of their acts, as, for example, from punishment for a criminal offence or damages for a breach of contract, the law nevertheless takes notice that there may be a doubtful point of law, and that a person may be ignorant of the law, and it is quite evident that ignorance of the law does in reality exist. It would, for instance, be contrary to common sense to assert that every person is acquainted with the practice of the Courts, although in such a case there is a presumption of knowledge to this extent, that "*ignorantia juris non excusat*," the rules of practice must be observed, and any deviation from them will entail consequences detrimental to the suitor (*Martindale v. Faulkener*). It is, therefore, in

the above qualified sense alone that the saying, that "all men are presumed cognizant of the law" must be understood (B. L. M., 250).

Illustration.

A is at work with a hatchet : the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable, and not an offence.

81. Nothing is an offence (40) merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm and in good faith (52), for the purpose of preventing or avoiding other harm to person or property.

Act likely to cause harm, but done without a criminal intent and to prevent other harm.

Vide note under Section 328, post.

Explanation.—It is a question of fact in such a case, whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations.

(a.) A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat, B, with twenty or thirty passengers on board, unless he changes the course of his vessel; and that by changing his course he must incur the risk of running down a boat, C, with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C, and in good faith, for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him incurring the risk of running down the boat C.

(b.) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

Act of a child under seven years of age.

82. Nothing is an offence (40) which is done by a child under seven years of age.

Incapacity of volition involves also incapacity to act. Hence the

insane, the child under seven years of age, the juridical person cannot, strictly speaking, act; but by a fiction of law the capacity to act is presumed in the last instance (T. & J. M. R., 467).

Infancy, that is, until the age of discretion has been reached, exempts from punishment the offender. Numerous discussions have arisen on the question as to what is to be considered the age of discretion, and the general opinion arrived at is, that under the age of seven an infant is to be considered irresponsible for his acts. With reference to this presumption—*juris et de jure*,—Mr. Austin remarks that it is probably well founded in almost every instance. It is probably made conclusive in *all* instances on account of the little advantage which could arise from the punishment of a child in any instance whatever. His punishment would rather revolt, than serve as a useful example, and it is therefore expedient to extinguish inquiry at once by a conclusive presumption of innocence (2 Aust. Jur., 184).

The Roman Civil Law divides age thus:—

I. *Infantia*, from birth to 7 years.

II. *Pueritia*. { (a) *Ætas infantia proxima*, from 7 to 10½.
(b) *Ætas pubertati proxima*, from 10½ to 14.

III. *Pubertas*, from 14 upwards. During *infantia* and *ætus infantia proxima* a person was not punishable for any crime. During *ætus pubertati proxima* a person was liable if *doli capax*. At *pubertas* a person became fully responsible (Tay. C. L., 254, et seq.).

On the subject of infancy and insanity, Mr. Austin says:—That wherever ignorance of law is a ground of exemption, the ignorance of law is presumed to have been *inevitable*, and the party to have been therefore *clear* of unlawful intention and inadvertence. An infant or person insane is exempted from liability not because he is an infant or because he is insane, but because it is inferred from his infancy or insanity that the alleged wrong was not the consequence of unlawful intention or inadvertence. It is *inferred* from his infancy or insanity that at the time of the alleged wrong he was ignorant of the law, or was unable to remember the law, or it is inferred that he was unable to apply the law and to govern his conduct accordingly,—that he did not and could not foresee the consequences of his conduct, and therefore did not and could not foresee that his conduct tended to the consequences which it was the end of the law to avert. For if the infant was *doli capax* his infancy does not excuse him. The specific and precise evidence afforded by the fact or its circumstances rebuts the general and uncertain presumption which arises from his age. And if the alleged wrong was done in a lucid interval, the fact is imputed to the madman. There are indeed cases, wherein the “*presumptio juris*” founded on infancy is “*juris et de jure*,” that is to say, the presumption (or rather the inference) which the law præappoints, is conclusive as well as præappointed. The tribunal is not only bound to draw the inference, but to reject the *counter-evidence*. As an instance of a presumption “*juris et de jure*” he mentions the case of an infant under a certain age; for example seven years. Here, according to the Roman law, and according to English law (and also the Penal Code) the infant is presumed “*juris et de jure*”

incapable of unlawful intention or culpable inadvertence. His incapacity is inferred or presumed from the age wherein he is ; and proof to the contrary of that præappointed inference, is not admissible by the tribunals (2 Austin Jur., 179-188).

83. Nothing is an offence (40) which is done by a child above seven years of age, and under twelve, who has not attained sufficient naturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Act of a child above seven and under twelve years of age, who has not sufficient maturity of understanding.

In construing this section the capacity of doing that which is wrong is not so much to be measured by years as by the strength of the offender's understanding and judgment: the circumstances of a case may disclose such a degree of malice as to justify the application of the maxim *malitia supplet aetatem* (2 W. R., 34). Under the provisions of the C. C. P., when any person under sixteen years of age is sentenced to imprisonment for any offence, the offender may be sent to a reformatory instead of to a jail.

An infant is in certain cases and under a certain age privileged from punishment by reason of a presumed want of criminal design.

In cases of misdemeanors and offences not capital.—In certain misdemeanors an infant is privileged under the age of twenty-one, as in cases of *non-feasance* only, for laches shall not be imputed to him (1 Hale, P. C., 20); but he is liable for misdemeanors accompanied with force or violence, as a riot or battery, so for perjury ; so he may be convicted of a forcible entry.

In cases of capital offences.—Under the age of seven years an infant cannot be punished for a capital offence, not having a mind *doli capax* (1 Hale, P. C., 19), nor for any other felony, for the same reason ; but on attaining the age of fourteen he is liable (in English law) to capital punishment for offences committed after that age (1 Hale, P. C., 25). Great doubt formerly prevailed regarding responsibility of infants between seven and fourteen. It is now clear, that where the offender is capable of distinguishing between right and wrong, and that he acted with malice and an evil intention, he may be convicted even of a capital offence. Thus, in 1629, an infant being eight or nine years of age was convicted of burning two barns in Windsor, and it appearing that he had malice, revenge, craft, and cunning, he was executed (Reg. v. Dean). In 1748, a boy of ten years of age was convicted of murder (Reg. v. York). It is necessary, says Lord Hale, speaking of convictions of infants between the years of seven and twelve, that very strong and pregnant evidence should be given to convict one of that age, and he recommends a respiting of judgment till the king's pleasure be known (1 Hale, P. C., 27 ; 4 Black. Com., 23 ; Roscoe, 898).

84. Nothing is an offence (40) which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Act of a person of unsound mind.

With reference to this and the preceding section, it may be remarked that the law extends its protection over those, who from want of years or infirmity, may be presumed to be unable to protect themselves.

Persons of unsound mind are declared by the law to be irresponsible, in like manner and upon the same principles as infants under seven years of age.

Every person at the age of discretion is, unless the contrary be proved, *presumed* by law to be sane, and to be accountable for his actions. But if there be an incapacity or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. This species of non-volition is either natural, accidental, or affected; it is either perpetual or temporary, and be reduced to three general heads:—1. *A nativitate, vel dementia naturalis*. 2. *Dementia accidentalis, vel adventitia*. 3. *Dementia affectata*. Of the *first* is idiocy, or natural fatuity; the *second* proceeds from various causes, and is of several kinds or degrees, either partial or total, permanent or temporary; the *third* will be found mentioned under the next Section 85 *post*.

To amount to a complete bar of punishment, either at the time of committing the offence or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If though somewhat deranged he is yet able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts (Allison's P. C. L., Scott, 645, 654). The *onus* of proving the defence of insanity, or, in the case of lunacy, of showing that the offence was committed when the prisoner was in a state of lunacy, lies upon the prisoner (*id.* 659); for this purpose, the opinion of the person possessing medical skill is admissible (Reg. v. Wright). The opinion of the Judges on certain questions propounded by the House of Lords, in consequence of the acquittal on the ground of insanity of D. Macnaughten for shooting Mr. Drummond, given at pages 905 to 910, Roscoe's Digest of Law Evidence in criminal cases, should be examined.

85. Nothing is an offence (40) which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to

Act of a person incapable of judgment by reason of intoxication caused against his will.

law : Provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

In the note under the preceding section mention has been made of the different species of non-volition, which were reduced to three general heads. The vice of drunkenness, which produces a perfect, though temporary, frenzy, or insanity usually denominated "*dementia affectata*," or acquired madness, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time (1 Hale, 32).

"In our own law," says Austin, "drunkenness would not seem to be an exemption. (In civil cases may release from contract.) In the Roman Law it was provided, that is, that the drunkenness itself was not the consequence of an unlawful intention. Ultimate ground of exemption, same as in insanity or infancy (*vide* note from Austin, Jur. under section 82 *ante*). When intentional drunkenness is *not* a ground of exemption, it is clear that the party is liable in respect of his heedlessness. He has no wrongful consciousness when drunk, but he might have known before he got drunk that it was not unlikely he should do mischief" (2 Austin Jur., 186). Drunkenness does not in the eye of the law make an offence the more heinous, though it is no excuse; and an act which if committed by a sober man is an offence, is equally an offence if committed by one when drunk, if the intoxication was voluntarily caused (16 W. R., 36. *Vide* note under Section 510, P. C.).

86. In cases where an act (33) done is not an offence (40) unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had, if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge, or against his will.

Vide note under Section 510, P. C. There are many men who well know that excess makes them mad, but if such persons wilfully deprive themselves of reason they ought not to be excused one crime by the voluntary perpetration of another (3 Paris and Foubl., M. J., 140; Roscoe, 910). Intoxication is no *proper excuse* for the commission of crime. With reference to a mind disordered by a state of habitual intoxication, Hale remarks: "That if by the long practice of intoxication an habitual or fixed insanity is caused, although this madness was contracted voluntarily, yet the party is in the same situation with regard to crimes as if it had been contracted involuntarily at first, and is not punishable."

87. Nothing which is not intended to cause death (46) or grievous hurt (320), and which is not known by the doer to be likely to cause death or grievous hurt, is an offence (40) by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm ; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Act not intended and not known to be likely to cause death or grievous hurt, done by consent.

With reference to the provisions contained in this and the following section, the Commissioners say :—" We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm, or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. The reason on which the general rule rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions."

Eighteen years of age.—In the original draft of the Penal Code the age was given as twelve years. For the difference between this and the following section see note (a) under Section 88 *post*.

Volenti non fit injuria.—" That to which a person assents is not esteemed in law an injury. This principle has often been applied under states of facts, showing that though the defendant was in the wrong, the plaintiff's negligence had contributed to produce the damage consequent on the act complained (B. L. M., 265).

Illustration.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play ; and if A, while playing fairly, hurts Z, A commits no offence.

88. Nothing which is not intended to cause death (46) is an offence (40) by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith (52), and who has given a consent, whether express or implied, to

Act not intended to cause death, done by consent in good faith for the benefit of a person.

suffer that harm, or to take the risk of that harm. (Compare with Section 91 and explanation to Section 92.)

There is a difference between this section and the preceding section (87). This Section 88 speaks of *any person*, whereas the former speaks of "any person above eighteen years" who has given such consent.

With reference to this Section 88, the Commissioners at note B say :—
"In general we have made no distinction between cases in which a man causes an effect designedly and cases in which he caused with a knowledge that he is likely to cause it. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may probably cause his death. He may labour under a cruel and wasting malady which is certain to shorten life, and which renders his life, while it lasts, useless to others and a torment for himself. Suppose that under these circumstances, he, undeceived, give his free and intelligent consent to take the risk of an operation which, in a large proportion of cases, has proved fatal, but which is the only means by which the disease can possibly be cured, and which, if it succeeds will restore him to health and vigour, we do not conceive it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause it, but knowing himself likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though, when they fire, they knew themselves to be likely to cause it."

Illustrations.

(a.) A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z with Z's consent; A has committed no offence.

(b.) Where death supervenes on emasculation, the operators are guilty of culpable homicide, notwithstanding the voluntary consent of the person operated on, and the fact of his being an adult. This Section 88, coupled with explanation appended to Section 92, does not justify the infliction of such an injury (although it was not intended to cause death), for the mere pecuniary benefit of the person voluntarily submitting to it (*Queen v. Baboohin Hijrah, &c.*, 15th Jan., 1866. 1 R. C. C. R., 12).

89. Nothing which is done in good faith (52) for the

Act done in good faith for the benefit of a child or person of unsound mind, by or by consent of guardian.

Provisoos.

benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence (40) by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person : Provided—

First. That this exception shall not extend to the intentional causing of death (46), or to the attempting to cause death ;

Secondly. That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death (46), for any purpose other than the preventing of death or grievous hurt (327), or the curing of any grievous disease or infirmity ;

Thirdly. That this exception shall not extend to the voluntary causing of grievous hurt (322), or to the attempting to cause grievous hurt (320), unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity ;

Fourthly. That this exception shall not extend to the abetment (107), of any offence (40), to the committing of which offence it would not extend.

The father, if a proper person, cannot be deprived of his legal right to the custody of his legitimate children, of whatever age (2 and 3 Vic., chap. 39), which gives a discretionary power to a Judge in England, has not been extended to this country ; therefore the law applicable to cases which occurred in England previous to the passing of that statute, is applicable here (*in re Holmes*, 1 Hyde's Reports, 99). The High Court in its equitable jurisdiction has authority to interfere with the legal right of a father to the custody of his child, if he be an improper person (*re A. F. Curran*, an infant, 1 Hyde's Reports, 143). The legal age of discretion of Hindoos in India is uniformly sixteen years ; up to that age the father has an undoubted right to the custody of his children (*in re Hem-mauth Bose*, 1 Hyde's Reports, 1). According to the Mahometan law, the mother is entitled to the custody of her child, if such child be a male, till it shall have attained the age of seven years ; if such child be a female, till it shall have reached the age of puberty (*in re Tayhet Alley*, an infant, 2 Hyde's Reports, 63). See Indian Digest, p. 191. With reference

to exposure and abandonment of child under twelve years of age by parent, see Section 317 *post* and note thereto.

Illustration.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

From the High Court ruling, *in re* Queen v. Anunto Rumagat, it appears that a previous consent having been given, it is presumed to exist until rescinded: *e.g.*, B having at different times requested A her husband to kill her, was killed by him while she was asleep, and, consequently, could not give consent—*held* that the act was only homicide by consent (6 W. R. C. R., 57).

Consent to be a valid plea must have been given freely. A constable who went into a house and had sexual intercourse with a woman, having first stationed a chowkeydar at the door, and the woman first objected, but subsequently consented—*held* to be rape; plea of consent not valid, as the chowkeydar barred the way and prevented escape or rescue, and the woman might reasonably have been in fear of injury consequent on continued objection (1 W. R. C. R., 21).

90. A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act (33) knows, or has reason to believe, (26), that the consent was given in consequence of such fear or misconception; or,

If the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

A misconception of fact, such misconception.—This word "misconception" does not apply to the quality of the act in question as being an offence or not; the misconception clearly concerns the matter of fact. The misconception respects the circumstances, taking them wrongly to be such as would warrant the act done according to law.

The consent must be free. An honest misconception of a person's skill by himself and the consenting party does not invalidate the consent of the latter (Queen v. Baludon Hijrah; 5 W. R. C. R., 7). Consent

given under the influence of passion amounts to consent under this section (Commissioners' Report).

91. The exceptions in Sections 87, 88, and 89 do not extend to acts (33) which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Acts which are offences independently of harm caused to the person consenting, are not within the exceptions in Sections 87, 88, 89.

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause, or be intended to cause, to the woman. Therefore it is not an offence "by reason of such harm;" and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

92. Nothing is an offence (48) by reason of any harm which it may cause to a person for whose benefit it is done in good faith (52), even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit: Provided—

Act done in good faith for the benefit of a person without consent.

Firstly. That this exception shall not extend to the intentional causing of death (46), or the attempting to cause death ;

Provisoos.

Secondly. That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity ;

Thirdly. That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt ;

Fourthly. That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Vide note on Section 88, P. C.

Illustrations.

(a.) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b.) Z is carried off by a tiger. A fires at the tiger, knowing it to be likely that the shot may kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(c.) A, a surgeon, sees a child suffer an accident which is likely to prove fatal, unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(d.) A is in a house which is on fire with Z, a child. People below hold out a blanket. A drops the child from the housetop, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

With reference to these illustrations, the Commissioners remarked in note B:—

"In these examples there is what may be called temporary guardianship justified by the emergency of the case and the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary Magistracy with which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship we extend a protection very similar to that which we have given to the acts of regular guardians."

Explanation.—Mere pecuniary benefit is not benefit within the meaning of Sections 88, 89, and 92.

93. No communication made in good faith (52) is an offence (40) by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Communication made
in good faith.

Illustration.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has

committed no offence, though he knew it to be likely that the communication might cause the patient's death.

94. Except murder (300) and offences against the State (Chapter VI) punishable with death (46), nothing is an offence (40) which is done by a person who is compelled to do it by threats, which at the time of doing it reasonably cause the apprehension that instant death to that person will otherwise be the consequence : Provided the person doing the act (33) did not of his own accord, or from a reasonable apprehension of harm to himself, short of instant death, place himself in the situation by which he became subject to such constraint.

The same principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crimes in subjection to the power of others and not as the result of an uncontrolled free action proceeding from themselves (17th ed. Arch., 22). A person is not liable for what he is forced to do by physical constraint, in which he is not an agent but an instrument or means. The act is not the act of the party at all. It bears, however, so strongly the *semblance* of an act of the party as to be properly mentioned in an exhaustive category of exemptions. Another case, distinguishable from this, in which the sanction might operate on the desires of the party, might be present to his mind, and the performance of the duty might not be altogether independent of his desires ; but the party is affected with an opposite desire, of a strength which no sanction can control, and the sanction therefore would be ineffectual : *e.g.*, a case in which a party is compelled by menaces of instant death to commit what would otherwise be a crime (26 Aust. Jur., 515, 3rd ed.).

With reference to subjection to the power of others, Blackstone says :— “As punishments or only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.” In private relations of life where a wife acts under the control of her husband she is excusable in point of law. There is no mention in the Penal Code, similar to this provision of the English law, of a wife acting under the coercion of her husband. (The astounding miscarriage of justice in the acquittal of Mrs. Torpey in the late jewel robbery case in England on this legal fiction of presumptive coercion of wives, makes it a matter of congratulation, that the Penal Code contains no such provision, there is no reason for presuming that the doctrine of English law would be allowed as a valid plea in this country. Maine, who appears to take the middle course between ridiculous of legal fictions like Bentham, and others who look upon them as nothing more than fraudulent devices, and those theorists, who discerning that fictions *have had* their uses, argue that

they ought to be stereotyped in our system, says "there can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction;" and Austin imputes many fictions "to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design good or evil." And again, Maine says, "If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of recent legislative improvements, are still abundant in it." The only provision relative to coercion in the Penal Code is contained in this section and applies alike to both sexes.) The same exemption is not granted to a child with reference to his parent or a servant to his master. But as regards a wife it is said that she "is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft or even a burglary by the coercion of her husband, or in his company which the law construes to be coercion, but this is only the presumption of law; if proved that the wife was not drawn to the offence by her husband, but that she was a principal actor in and inciter of it, she is guilty as well as the husband (Russ. on Crimes, 20).

Coercion may be twofold, that is, *vis compulsiva*, which is mental and psychological in its character; and *vis absoluta* or physical force. The employment of force does not nullify an act done, but it may exempt from its more serious consequences. In such a case the presumptions are, that there are what is termed *metus injustus ex parte inferentis* a *metus non vani hominis*, a *metus majoris malitatis*, and a *metus* directed against the person himself under coercion (T. & J. M. R. L., 66).

To obtain the benefit of the exception allowed by this section, it must be shown that the prisoners were compelled to act as they did from apprehension that instant death would be the consequence of a refusal (10 W. R., 48).

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits (400), knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence (40) by law.

Explanation 2.—A person seized by a gang of dacoits (400), and forced, by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

"The excuse of compulsion," says Allison at 672 of his Criminal Law, "will only avail if the prisoner was in such a situation that he could not resist it without manifest peril to his life or property."

95. Nothing is an offence (40) by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Act causing slight harm.

De minimis non curat lex (See B. L. M., 148).

Conviction and sentence by a Magistrate reversed, as the act of which the accused were convicted, *vis.*, taking pods (almost valueless) from a tree standing on Government waste ground, came within meaning of this section, and did not therefore amount to an offence (Bo. H. Ct. R., Crown cases, 35, 1868).

The intention of this section is stated by the Law Commissioners as follows:—

“This section is intended to provide for those cases which, though from the imperfections of language they fall within the letter of the law are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man’s ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crime. That these ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code, than to leave it to the Judges to except them in practice.”

OF THE RIGHT OF PRIVATE DEFENCE.

Nothing done in private defence is an offence.

96. Nothing is an offence (40) which is done in the exercise of the right of private defence.

In this and the ten following sections the Commissioners except from the Penal Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. They have here attempted to define, with as much exactness as the subject appears to admit, the limits of the right of private defence. They speak of this chapter with great diffidence as the part of the Code the least satisfactory to themselves, at the same time observing that they are “inclined to think it must always be one of the least exact parts of every system of Criminal Law.” The difficulty is inherent. A nicely graduated scale of urgency is impossible, because it depends on a combination of so many circumstances wherein those which are higher in their kind may exist in a lower degree, and because the rule

is to be applied by unlearned men under circumstances likely to deprive them of self-possession (See L. C. R., note B, 19 to 22; and L. C., 1st R., 45).

Necessitas inducit privilegium quoad jura privata. — With respect to private right, necessity privileges a person acting under its influence (Legal Maxims, 10; See note under Section 299, P. C.).

In the case of self-defence, "the law respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. Self-defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay even for homicide itself; but care must be taken that the resistance does not exceed the bounds of mere defence and prevention (3 Black. Com., 4).

The American Municipal Law as well as the law of other countries "has left individuals the exercise of the natural right of self-defence, in all those cases in which the law is either too slow, or too feeble to stay the hand of violence. This right is founded on the law of nature, and is not and cannot be superseded by the law of society" (K. A. L., 630, 10th ed.).

Right of private defence of the body and of property. 97. Every person has a right, subject to the restrictions contained in Section 99, to defend—

First. His own body and the body of any other person against any offence affecting the human body.

Secondly. The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass. (Compare with Sections 99 and 102, restriction as to right of private defence.)

Under Roman law as a rule self-help was forbidden. It was, however, permissible to repel illegal attacks upon lawful conditions where no more than necessary force was employed (T. & J. M. R. L., 83).

Vide note 3, Section 299, P. C.

98. When an act (33) which would otherwise be a cer-

Right of private defence against the act of a person of unsound mind, &c.

tain offence (40), is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have, if the act were that offence.

Illustrations.

(a.) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b.) A, enters by night a house which he is legally entitled to enter. Z, in good faith taking A for a housebreaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z which he would have if Z were not acting under that misconception.

99. *First.* There is no right of private defence against an act (33) which does not reasonably cause the apprehension of death (46) or of grievous hurt (320), if done, or attempted to be done, by a public servant (21) acting in good faith (52) under colour of his office, though that act may not be strictly justifiable by law.

Acts against which there is no right of private defence.

It appears that in the case of a person caught committing house-breaking at night in order to commit theft, the law extends to a private person making an arrest on his own motion this power of arrest (4 W. R. C. R., 8). The person arrested would consequently commit an offence should he resist his arrest by force, but this is not by any means clear.

Second. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

The English and Indian laws differ somewhat on this point of arrest. Under the English law, a person offering resistance to a public servant making an arrest is extenuated if the document of warrant or writ is defective in the frame of it, or if the manner of making arrest is illegal, or

if the name of the officer or party is entered without due authority ; but the law of India allows no extenuation on any of these accounts as long as the act is *bonâ fide*.

Third.—There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

The right of private defence being granted for defence only, it must not and cannot legally be exercised when there is time to have recourse to the protection of the public authorities. A acts in such a manner that it is clear he purposes forcibly enforcing a right, instead of applying to the public authorities. This clause will not protect him. For a party to justify his actions under Section 105 *post*, he must prove that he applied for the protection of the law, or did what in him lay to procure its intervention (4 R. C. C. R., 21).

Fourth.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Extent to which the right may be exercised.

Vide note 3, Section 299, P. C.

To justify the right herein accorded, it is essential to prove necessity of the force, *viz.*, that the alternative lay between suffering the insult or wrong or inflicting the harm caused (2 W. R. C. R., 59). The attacked party has the right of defence, and may oppose force by force to the infliction of such injury as is really necessary and legal (7 W. R. C. R., 112): *e.g.*, A found B, a thief, entering his house at night through an entrance made in the side wall with a burglarious intent. A seized him while intruding his body and held him with his face down to the ground to prevent his further entrance, and caused B's death by suffocation—he was held not to have used more than necessary force (3 W. R. C. R., 12). The amount of force necessary depends on the circumstance of the case ; there is no protection if the harm is caused by excessive violence quite unnecessary to the case : *e.g.*, A killed a poor feeble old woman found thieving in his house—held this section did not protect him (5 W. R. C. R., 33). So also A caught a thief in his house, and deliberately killed him with a spade to prevent his escaping (*id.* 73).

Explanation 1. A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2. A person is not deprived of the right of private defence against an act done, or attempted to be

done, by the direction of the public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence (40) which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :—

When the right of private defence of the body extends to causing death.

Firstly.—Such an assault (351) as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Secondly.—Such an assault (351) as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Thirdly.—An assault (351) with the intention of committing rape (375);

Fourthly.—An assault (351) with the intention of gratifying unnatural lust (359);

Fifthly.—An assault (351) with the intention of kidnapping or abducting (362);

Sixthly.—An assault (351) with the intention of wrongfully confining (340) a person (11) under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

With reference to the restrictions in the last preceding section, it is doubtful whether, if the defendants do not use their right of private defence at first, they can do so subsequently: *e. g.*, A was attacked, and without resisting retired home, where having armed himself he returned and wounded B, who had assaulted him. There appears little doubt but that in so doing A distinctly overstepped the powers given him by this Code, and so it was held *in re Queen v. Sohun*, but not *unanimously*.

Resistance is allowable only in so far as to prevent the offence: *e.g.*, A sees B enter his house and steal his property; he cannot take B aside and chastise or kill him subsequent to catching and preventing him carrying off his property (see note 3 under Section 105 *post*).

101. If the offence (40) be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death (46).

When such right extends to causing any harm other than death.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

Commencement and continuance of the right of private defence of the body.

103. The right of private defence of property extends, under restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence (40), the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions herein-after enumerated, namely:—

When the right of private defence of property extends to causing death.

First.—Robbery (390).

Secondly.—House-breaking by night (446).

Thirdly.—Mischief by fire committed on any building, tent, or vessel, which building, tent, (436) or vessel is used as a human dwelling, or as a place for the custody of property.

Fourthly.—Theft (378), mischief (425), or house-trespass (442), under such circumstances as may reasonably cause apprehension that death (46) or grievous hurt (320)

will be the consequence, if such right of private defence is not exercised.

104. If the offence (40), the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft (378), mischief (425), or criminal trespass (441), not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrong-doer of any harm other than death.

When such right extends to causing any harm other than death.

Vide note 3, Section 299, P. C.

105. *Firstly*.—The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Commencement and continuance of the right of private defence of property.

A party in possession of land is legally entitled to defend his possession against another party seeking to eject him (2 B. L. R., Part VIII, 16).

Secondly.—The right of private defence of property against theft (378) continues till the offender has effected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered.

Thirdly.—The right of private defence of property against robbery (390) continues as long as the offender causes, or attempts to cause, to any person death (46), or hurt (319), or wrongful restraint (339), or as long as the fear of instant death, or of instant hurt, or of instant personal restraint continues.

Fourthly.—The right of private defence of property against criminal trespass (441) or mischief (425) continues as long as the offender continues in the commission of criminal trespass or mischief.

Fifthly.—The right of private defence of property against house-breaking by night (446) continues as long

as the house-trespass (442) which has been caused by such house-breaking continues.

Where an affray took place, both parties turning out armed with deadly weapons, it cannot be said that there was any right of private defence, as either party well knew before hand what was likely to happen (3, R. C. C. R., 21). Parties seeking to justify their acts under this section, must show that they applied for the protection of the law, or did what in them lay to procure its intervention (*id.*)

The right of private defence continues only so long as the house-trespass continues; if a person follows a thief and kills him after the house-trespass has ceased he cannot plead the right of self-defence (10 W. R. C. R., -9).

106. If, in the exercise of the right of private defence against an assault (351) which reasonably causes the apprehension of death (46), the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Right of private defence against a deadly assault, when there is risk of harm to an innocent person.

Illustration.

A is attacked by a mob, who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence, if by so firing, he harms any of the children.

CHAPTER V.

OF ABETMENT.

The Indian Penal Code substituted by this its 5th Chapter, the New Law of Abetment, for the Old Law of Accessories before the fact. An accessory before the fact (in English law) is he who, being *absent* at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony (1 Hale, 615), it is essential to constitute the offence of accessory, that the party *should be absent* at the time the offence is committed (R. v. Gordon, 1 Leach, 515).

Abetment of a thing. 107. A person abets the doing of a thing, who—

Firstly.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person (11) or persons in any *conspiracy* for the doing of that thing, if an act (33) or *illegal* (43) *omission* (33) takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Omission.—An omission to give information that a crime has been committed does not under this section amount to abetment, unless such omission involves a breach of a legal obligation. A private individual is not bound by any law to give information of any offence which he has seen committed (*Queen v. Khadur Sheikh*, 4 B. L. R., 7).

Conspiracy.—A conspiracy is the combination of two or more persons with a view to injure another by fraud. (*R. v. Warburton*, 6 M. J. 155).

Thirdly.—Intentionally aids, by any act (33) or illegal omission (33), the doing of that thing.

A prisoner who consented to form one of a party who committed theft, and subsequently withdrew from his agreement, but was present at the commission of theft, does not come within this Clause, but of the abetment thereof, under Clause 3 of this Section 107 and Section 109, read together (8 W. R., 78; *Queen v. Boodhun Mooshur*).

In a charge of abetment, the section of the principal offence, and the particular section of this Chapter V. which the case comes, should be mentioned, with the circumstances which bring it under the said section (1 W. R. Cr. L.).

Concealment of murder does not necessarily amount to abetment, but may form evidence in support of the general charge. It is true that Section 107 lays it down that illegal omission which aids the doing of a thing is abetment. But this refers to an omission at the time of the doing of the act. Mere concealment of the murder afterwards is not tantamount to an illegal omission and to abetment (5 R. J. P. J., 106. *Queen v. Bidyadhur Mahanty, &c.*).

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

A person can be convicted of theft under the 1st Explanation of this Section 107 only if he either procures or attempts to procure the com-

mission of the theft ; mere subsequent knowledge of the offence is insufficient (2 W. R., 40 ; *Queen v. Sumeeroodeen*, &c.).

Illustration.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact, and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C. "The mere omission by a private person to make known an offence which he had seen committed, as if he saw my servant damaging some of my property, would not render that person liable to be charged with the abetment of the offence he had seen committed. There would be a moral obligation on him to make the fact known to me, but nothing more (S. M. & S., App. VI).

Explanation 2. Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

108. A person abets (107) an offence (40) who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Abettor.

Explanation 1. The abetment of the illegal omission (33) of an act (33) may amount to an offence (40), although the abettor may not himself be bound to do that act.

Explanation 2. To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations.

(a.) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b.) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3. It is not necessary that the person

abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations.

(a.) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence if committed by a person capable by law of committing an offence, and having the same intention as A. Here A whether the act be committed or not, is guilty of abetting an offence.

(b.) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act, and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c.) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he was doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d.) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4. The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5. It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.

Illustration.

A concert with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section, and is liable to the punishment for murder.

[*Cl. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Accord-
ing as offence abetted
is bailable or not.*]

109. Whoever abets (107) any offence (40) shall if the act (33) abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence

Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment.

The question was put as to whether an offender could be whipped for the abetment of an offence punishable under Act VI of 1864, with whipping; as also whether with reference to Section 511 of the Penal Code, an attempt to commit an offence punishable with whipping could be punished with whipping.

The Court concurred in opinion with the Sessions Judge, that, "a person who abets an offence which is punishable by whipping is liable to be punished by whipping, if the act abetted, that is to say, the offence which is punishable by whipping, is committed in consequence of the abetment. But the abettor would not be liable to be punished by whipping, if the act done be different from the act abetted, and if the act done be not punishable by whipping. They also concurred that an attempt to commit an offence is not punishable by whipping" (H. C. C. No. 425 of 1864).

This section clearly makes a distinction between "offence" and "act." It is true there is no general specific provision in the Code relating to the abetment of acts committed outside the jurisdiction which if committed within the jurisdiction would be offences under the Code; but *Quere* does not this Section 109 really cure that defect? Section 20 of the Criminal Law Amendment Act appears to bear out this view (read also 30 & 31 Vic., c. 124, s. II.).

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When C falsely represented himself to be U, and the writer of a document signed by U, and T, knowing that C was not U and had not written such document, adduced C as U, and as the writer of that document—*held* that T ought to have been convicted on a charge of abetting giving false evidence (8 W. R., 5; *Queen v. Chundi Churn Nath*).

In a charge of abetment, the section creating the principal offence, and also the particular section of this chapter under which the case falls, must be mentioned, and also the circumstances which bring it under that section (1 W. R., Cr. L., 9).

Explanation.—An act (33) or offence (40) is said to be committed, in consequence of abetment (107) when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Mr. Mayne in his commentary on the Penal Code under this Section remarked that the offence of abetment can only be committed in respect of offences under the Penal Code, not of offences under any special or local law (3 R. C. C. R., 31, 33); nor of offences under the English Law. This defect was not cured by Act IV of 1867. He quoted *R. v. Kullimodin, R. v. Rambejanlak*, and was quoted himself in *R. v. Elmstone, Whetwell, &c.* (7 Bo. H. C. R., 116). What Act IV of 1867 left unmentioned and untouched as regards this Section 109 was cured by Act XXVII of 1870.

By Section 2 Act XXVII of 1870, the word “offence” in this Section 109 denotes a thing punishable under this Code, or under any special and local law as defined in Sections 41 and 42 *ante*.

Illustrations.

(a.) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Section 161.

(b.) A instigates B to give false evidence. B, in consequence of the instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c.) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B, in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence, and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Accord-
ing as offence abetted
is bailable or not.*]

110. Whoever abets (107) the commission of an offence

Punishment of abetment if the person abetted does the act with a different intention from that of the abettor.

(40) shall, if the person (11) abetting does the act (33) with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed, if the act had been done with the intention or knowledge of the abettor, and with no other.

By Section 2 Act XXVII of 1870, the word "offence" in this section denotes a thing punishable under this Code or under any special or local law as defined in Sections 41 and 42 *ante*.

[*Ct. by which offence abetted is triable.*]

[*Cog. if for offence abetted Cog. According as offence abetted is bailable or not.*]

111. When an act (33) is abetted (107) and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it: provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid, or in pursuance of the conspiracy which constituted the abetment.

Liability of abettor when one act is abetted and a different act is done.

Proviso.

Illustrations.

(a.) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was, under the circumstances, a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(b.) A instigates B to burn Z's house. B sets fire to the house, and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c.) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable con-

sequence of the abetment, A is liable to the punishment provided for murder

[*Ct. by which offence abetted is triable.*]

[*Cog. if for offence abetted Cog. According as offence abetted is bailable or not.*]

112. If the act (33) for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence (40), the abettor is liable to punishment for each of the offences.

Abettor when liable to cumulative punishment for act abetted and for act done.

By Section 2 Act XXVII of 1870, the word "offence" in this section denotes a thing punishable under this Code or under any special or local law as defined in Section 41 and 42 *ante*.

Illustration.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences.

[*Ct. by which offence abetted is triable.*]

[*Cog. if for offence abetted Cog. According as offence abetted is bailable or not.*]

113. When an act (33) is abetted (107) with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable, in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect: provided he knew that the act abetted was likely to cause that effect.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.

Illustration.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Accord-
ing as offence abetted
is bailable or not.*]

114. Whenever any person (11) who, if absent, would be liable to be punished as an abettor, is
Abettor present
when offence is com- present when the act (33) or offence (40)
mitted. for which he would be punishable in consequence of the abetment (107) is committed, he shall be deemed to have committed such act or offence.

By Section 2 Act XXVII of 1870, the word "offence" in this section denotes a thing punishable under this Code, or any special or local law as defined in Sections 41 and 42 *ante*.

This section provides for the punishment of what the English Law calls principals in the second degree. Principals in the second degree are those who are present, aiding and abetting at the commission of the fact. Presence in this sense is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise (for example see Aarch, 17th Ed., 8—11); and the framers of the Code say:—"We consider that all who, as being actually *present* and assisting in the commission of an offence, come directly within the definition of principals in the second degree in the English Law, are regarded by the Code as accomplices in the fact, or more strictly 'accessories at the fact,' and guilty of the offence without distinction" (1 Report, 65).

The meaning of Section 114 is that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though in point of fact another actually committed it (No. 459 M. H. C., March 1869).

Where grievous hurt was caused, and the evidence went to show that the attack was unpremeditated, the conviction for abetment, under Section 114, of certain prisoners who stood by while the assault was being committed by others is not sustainable.

In order to bring a prisoner within this Section 114, P. C., it is necessary first to make out the circumstances which constitute abetment, so that "if absent" he would have been "liable to be punished as an abettor," and then to show that he was also present when the offence was committed (7 W. R., 49).

Illustration.

A writes to B, telling him that C is likely to pass along a certain road with treasure, and instigates B to lie in wait for and rob C. B, on such instigation, lies in wait for and robs C, A accompanying C along his journey. A is guilty under Section 114, P. C.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Not bail-
able.*]

115. Whoever abets (107) the commission of an offence punishable with death (46) or transportation for life, shall, if that offence be not committed in consequence of the abetment (107), and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine; and if any act for which the abettor is liable in consequence of the abetment, and which cause hurt (319) to any person (11), is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

By Section 2 Act XXVII of 1870, in this and the preceding Section 114, the word "offence" denotes a thing punishable under this Code or under any special or local law as defined in Sections 41 and 42 *ante*.

Illustration.

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years, and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Not bail-
able.*]

116. Whoever abets (107) an offence (40) punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term, provided for that offence, or with such fine as is provided for that offence, or with both; and if the abettor or the person abetted is a public servant (21), whose duty it is to

Abetment of an offence punishable with imprisonment, if the offence be not committed in consequence of the abetment.

If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.

prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

By Section 2 Act XXVII of 1870, the word "offence" in this section denotes a thing punishable under this Code or under any special or local law as defined in Sections 41 and 42 *ante*.

A Police Magistrate has power to convict summarily, under Act IV of 1866 (B. C.), Section 26, for an offence punishable under Section 116, 1 P. C. B. L. R., 39.

Illustrations.

(a.) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(b.) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(c.) A, a police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(d.) B abets the commission of a robbery by A, a police officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Not bail-
able.*]

117. Whoever abets (107) the commission of an offence (40) by the public (12) generally, or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Abetting the commission of an offence by the public, or by more than ten persons.

By Section 2 Act XXVII of 1870, the word "offence" in this section denotes a thing punishable under this Code or under any special or local law as defined in Section 41 and 42 *ante*.

An abetment by ten persons, which results in twelve coolies breaking their several contracts, is not abetment within Section 117, P. C., as each breach of contract constitutes a separate offence, under Sections 492, P. C., by each coolie.

Illustrations.

A, B, and C abet thirty-three coolies to break their several contracts; this is an abetment within Section 117, P. C.

A affixes in a public place a placard, instigating a sect consisting of more than ten members to meet at a certain time and place for the purpose of attacking the members of an adverse sect while engaged in a procession. A has committed the offence defined in this section.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Not bail-
able.*]

118. Whoever, *intending to facilitate*, or know it to be likely that he will thereby facilitate, *the commission of an offence* punishable with death (46) or transportation for life, voluntary (39) conceals, by any act (33) or illegal omission (33), the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years; or, if the offence be not committed, with imprisonment of either description (53) for a term which may extend to three years: and in either case shall also be liable to fine.

To render a person punishable under this section and Section 120, there must be an act or *illegal* omission, not merely a simple omission (p. 83, Mr. Campbell's printed Circular, J. C., O.).

Intending to facilitate the commission of an offence.—And in 5 R. J. P. J., 106, it was ruled, that though coupled with other facts, it may be evidence of an abetment, concealment of an offence after it has taken place is not *per se* an abetment. Mere concealment without the intention or knowledge mentioned in this section is no offence under this section. It is necessary, to sustain a conviction, to show that the concealment was either by act or omission, and also as to the accused's legal liability to inform of the commission or probable commission of the said crime or design. See note under Section 120 *post*.

Illustration.

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to

facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Accord-
ing as offence abetted
is bailable or not.*]

119. Whoever, being a public servant (21), intending to facilitate, or knowing it to be likely that he will thereby facilitate, the commission of an offence (40), the commission of which it is his duty as such public servant to prevent, voluntarily (39) conceals, by any act (33) or illegal omission (33) the existence of a design to commit such offences or makes any such representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of any description (53) provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both; or, if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years; or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Illustration.

A, an Officer of Police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.

[*Ct. by which offence
abetted is triable.*]

[*Cog. if for offence
abetted Cog. Accord-
ing as offence abetted
is bailable or not.*]

120. Whoever, intending to facilitate, or knowing it to

Concealing a design to commit an offence punishable with imprisonment.

If the offence be committed.

If not committed.

be likely that he will thereby facilitate, the commission of an offence (40) punishable with imprisonment, voluntarily (39) conceals, by any act (33) or illegal omission (33), the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Compare Section 118 *ante*, and this Section 120 with Sections 176 and 177 *post*. The offence contemplated in the former sections can only be committed by concealing a design or making a false representation with intent to facilitate the commission of an offence ; under the latter sections, the offence consists in the breach of a duty ; and whereas the former Sections refer to information regarding the commission of offences, the latter refer to *any information the party is legally bound to give*.

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

It being exceedingly doubtful whether the Statute Law of Treason could be binding on natives of India in the Mofussil, it was desirable that the Imperial Legislature *should* pass a law of high treason for the East India Company's territories. There was no particular occasion for a law to be passed against offences directed immediately against the Sovereign persons, but it was highly requisite that persons residing in the territories of the East India Company, who might at any time become parties to the levying of war against the British Crown, should be made subject to the jurisdiction of the Courts established by Royal Charter, and to legal punishment. For these reasons, this Chapter was framed, suspending, as it were, the English Law of Treason.

Prosecutions for offences under Chapter VI, P. C., cannot be instituted except with the sanction of Government or other authorized person. Act II of 1855, Section 28, gives treason as an exception to the general rule that the evidence of a single witness is sufficient to prove a fact. By English law in cases of treason, as a rule, two witnesses are requisite to prove the treason or overt acts of the same treason, unless the defendant confess one witness is sufficient to prove a collateral fact, such as accused is a British subject (Taylor Ev. 872). Section 134 of the Evidence Act says, "No particular number of witnesses shall in any case be required for the proof of any fact," and as the schedule to the Act repeals Act II of 1855 wholly, treason is now no exception to the general rule. The evidence in cases of conspiracy is wider than perhaps in any other case, taken by themselves. The acts of a conspiracy are rarely of an unequivocal guilty character, and can only be properly estimated when connected with all the surrounding circumstances. Material points for the consideration of the jury are the general character and intention of the parties (Roscoe, 88).

Section 5, Act VI of 1864, provides for whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment, but whipping may be inflicted for *first or any other offence*, and is to be administered in the way of school discipline with a light rattan (Par. 6, Cir. No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death or transportation or penal servitude or imprisonment for more than five years*, shall be whipped (Section 7, Act VI of 1864).

[Ct. of S.]

[Uncog. Not bail-
able.] [Warrant.]

121. Whoever wages war against the Queen (13), or attempts to wage such war, or abets (107) the waging of such war shall be punished with death (46) or transportation for life, and shall forfeit all his property. (*Information compulsory, vide* Section 89, C. C. P.)

Waging or attempting to wage war, or abetting the waging of war against the Queen.

Illustrations.

(a.) A joins an insurrection against the Queen. A has committed the offence defined in this section.

(b.) A in India abets the insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.

War, a contention by force ; a fighting between two Kings, Princes, or parties, in vindication of what they conceive to be their just rights (W. L. L., 975).

Or Attempts to wage War or Abets.—It will be seen from this section

that the attempt at, or abetment of, hostilities against the Government has been made a separate offence, and not left to the ordinary law of abetments; and this, the Law Commissioners observe, is for two reasons. 1st. Because war may be waged against Government by persons in whom it is no offence to wage such war; 2nd, because though, in general, a person who has been a party to a criminal design which has not been carried into effect, ought not to be so severely punished as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State; for State crimes, and especially the most heinous and formidable State crimes, have this peculiarity, that if they are successfully committed, the criminal is almost always secure from punishment. . . . As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginning of rebellion, and against treasonable designs which have been carried no further than plots and preparation.

The rule of law as to abetment is that where parties concert together and have a common object, the act of one of the parties done in furtherance of the common object, and in pursuance of the concerted plan, is the act of the whole (17 W. R., 15).

By illustration (b) we find abetment in British India of an offence itself committed beyond British Indian territory specially rendered punishable in British India. On this point Westropp, C. J., *in re R. v. Elmstone, &c.*, said: "It may be that the Indian Legislature had power so to legislate as to abetment in India of an offence committed out of India, and may not have had power to legislate for the *principal* offence itself, if committed beyond British Indian territory."

War may be waged by taking arms, not only to dethrone the King, but under pretence to reform religion, or the laws, or to remove evil Counsellors or other grievances, whether real or pretended. To resist the King's forces by defending a castle against them is a levying of war; and so is an insurrection with an avowed design to pull down *all* enclosures, *all* brothels, and the like, the universality of the design making it a rebellion against the State, a usurpation of the powers of Government, and an insolent invasion of the King's authority. But there must be an insurrection and that insurrection must be accompanied with force, and it must be for an object of a general nature. Giving intelligence, sending provisions, selling arms to the enemy, surrendering a fortress, or the like, is high treason (4 Black. Com., 78). The above is called in England levying war, the waging war contemplated by this section appears somewhat narrower in its limitation, being limited to aggressive operations.

In England there is no limitation of time applicable to the prosecution of crimes, except in special cases fixed by Statute, as treason, smuggling, and the like.

According to the custom of Scotland, crimes prescribe in twenty years, following the rule of the Roman Law; but in particular crimes the prescription is limited by Statute to a shorter period (2 Hume's Criminal Law, 136).

Prescription applicable to crimes is admitted in the French Law according to certain rules laid down in the Code (Mack. R. L., 350). Since the Union of the two kingdoms in 1707, the laws of treason in England and Scotland have been assimilated. The trial proceeds according to the English forms. A bill is found by a Grand Jury, and the Petty Jury consists of twelve persons (*id.* 361).

The special limitation of the period for prosecution (three years) in cases of treason and misprision of treason under Stat. 7, Wm. III, Cap. 3, Section 5, is an exception to the general rule in criminal cases; and in enacting this Section 121, the Legislature has not thought fit to limit in any way the period within which a prosecution for an offence against that enactment may be commenced, and consequently such limitation does not form part of the Penal Code. In a case in which the accuser was charged with abetting the waging of war against the Queen, under this section it was held that the *Calcutta Gazette* and *Gazette of India* were admissible in evidence under Section 8, Act II of 1855, to prove the proclamation and official communications of the Government relating to the war. A printed official letter from the Secretary of the Government of the Punjab to the Secretary of the Government of India was held to be admissible in evidence under Section 6, Act II of 1855 (*R. v. Ameer-ooddeen*, 15 W. R., 25).

[*Cl. of S.*]

[*Uncog. Not bail-
able.*] [*Warrant.*]

"121A. Whoever within or without British India conspires to commit any of the offences punishable by Section 121, or to deprive the Queen of the sovereignty of British India, or of any part thereof, *or conspires to overawe by means of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years.* (*Information compulsory, vide Section 89, C. C. P.*)

"*Explanation 1.*—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof."

Section 13, Act XXVII of 1870. The following chapters of the Penal Code, namely IV (General exceptions), V (of abetment), and XXIII (of attempts to commit offences) shall apply to offences punishable under this Section 121A.

Section 14, Act XXVII of 1870. No charge of an

offence punishable under this Section 121A shall be entertained by any Court unless the prosecution be instituted by order of, or under authority from, the Local Government.

This Section 121A was inserted by Section 4, Act XXVII of 1870.

Or conspires.—Wharton, in his Lexicon, p. 223, gives the following definition of *conspiracy*. A combination or agreement between several persons to carry into effect a purpose hurtful to some individual, or to particular classes of community, or to the public at large ; though this is subject to exceptions in the case where the offence is a felonious one, and actually accomplished, the offence of conspiracy which is misdemeanor only, being then merged in the felony. Conspiracy has been frequently defined to be an agreement for an unlawful purpose by unlawful means ; but this antithetical definition was questioned in *R. v. Peck*, 9 A. and E., 686.

Webster, at p. 280 of his Dictionary gives the following definition. (1.) A combination of men for an evil purpose ; an agreement between two or more persons, to commit some crime in concert as treason, sedition, or insurrection, an agreement for the purpose of wrongfully prejudicing another, or to injure public trade, to affect public health, to insult public justice, a plot. (2.) A concurrence or general tendency of causes or circumstances to one event.

In re R. v. Warburton, see Section 107, *ante*, a conspiracy was defined “as a combination of two or more persons with a view to injure another by fraud,” and in his summing up *in re R. v. Boulton and Park*, the Lord C. J. remarked, “that conspiracy was the *common action of at least* two minds, and before convicting of conspiracy, the Jury should be satisfied as to reciprocity of sentiment existing on the part of the defendant.” When persons are joined together in an indictment for conspiracy, evidence is admissible against them individually and collectively, which would not be admissible against them, or some of them, if tried individually. (See further remarks about evidence admissible in such cases in the following note.)

After Section 121 has been inserted this new Section 121A, providing for the offence of conspiring to wage war against the Queen, or to wage civil war. Such a conspiracy was punishable only when it amounted to an abetment as defined by the Code, *i.e.*, when an act or illegal omission takes place in pursuance of that conspiracy. This section immensely tightens the grip of the law on treasonable combinations. A firm and bold law on this point is especially necessary in this country, and will be thoroughly understood and appreciated by the natives themselves. In the words of the poet :—

“Tender handed touch a nettle,
And it stings you for your pains :
Grasp it like a man of mettle,
And it soft as silk remains.

So it is with common natures—
Use them kindly they rebel :
But be rough as nutmeg graters,
And they will obey you well."

With reference to evidence admissible as part of the *res gesta* in prosecutions for conspiracy, or generally of an offence committed by confederates, it is an established rule, that any act done by one of the party in pursuance of the original concerted plan and with reference to this common object, is, in the contemplation of the law, the act of the whole party. It follows, therefore, that any writings, or verbal expressions, being acts in themselves, or accompanying and explaining other acts, and so being part of the *res gesta*, and which are brought home to one conspirator, are evidence against the other conspirators, provided it sufficiently appear that they were used in the furtherance of the common design. For the same reason declarations or writing explanatory of the nature of a common object in which the prisoner is engaged, together with others, are receivable as evidence, provided they accompany acts done in the prosecution of such an object, arising naturally out of these acts and not being in the nature of a subsequent statement or confession of them (Ph. L. E.).

"This section renders the offence of conspiring to deprive the Queen of the sovereignty of British India, or to overawe the Government, punishable with transportation for life, or for any shorter term, or with imprisonment which might extend to ten years. It was thought right to make the offence of conspiring by criminal force, or by the show of criminal force, more severely penal than the offence of actually taking part in an unlawful assembly, having for its object the overawing of the Government. The reason was this, that persons who, by conspiring together to bring about such a result, set the whole matter in motion, seemed more criminal and far more deserving of punishment than those who were their mere tools, and only took part in such an assembly" (Mr. Stephen's speech, see p. 1312, *Gazette of India*, December 3rd, 1870).

[*Ct. of S.*]

[*Uncog. Not bail-able.*] [*Warrant.*]

122. Whoever collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen (13), shall be punished with transportation for life, or imprisonment of either description (53) for a term not exceeding ten years, and shall forfeit all his property. (*Information compulsory, vide* Section 89, C. C. P.)

Under Section 62, P. C., *ante*, it is optional with the Court to award forfeiture in addition to death or transportation for life, but under this and Section 121, if offender be convicted, the Court has no option, but must order the forfeiture of the offender's property, and the punishment for

fraudulently removing or concealing of property, to prevent its seizure as a forfeiture. (See Section 206, *post.*)

[*Ct. of S.*]

[*Uncog. Not bail-
able.*] [*Warrant.*]

* 123. Whoever by any act (33), or by any illegal omission (33), conceals the existence of a design to wage war against the Queen (13), intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

To gain a conviction under this section there must be (1). The existence of a design to wage war against the Queen; (2). Knowledge on the part of the accused of such existing design; (3). Concealment of such design by act or illegal omission on the part of the accused; and (4). Intent with which such design was concealed.

[*Ct. of S.*]

[*Uncog. Not bail-
able.*] [*Warrant.*]

* 124. Whoever, with the intention of inducing or compelling the Governor-General of India, or the Governor of any Presidency, or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of any Presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant-Governor, or Member of Council, assaults (351), or wrongfully restrains (339), or attempts wrongfully to restrain (511), (339), or overawes by means of criminal force (350), or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor, or Member of Council, shall be punished with imprisonment of either description (53), for a term which may extend to seven years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

With reference to the parties named in this section and proof of their appointment, all that is necessary is to prove that such person acted as described. It is not necessary to prove his appointment, for it is a maxim

of law, "*omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*," and that a man, acting in a public capacity, was properly appointed and duly authorized is a general presumption illustrative of the above quoted maxim.

[*Ct. of S.*]

[*Uncog. Not bail-
able.*] [*Warrant.*]

124A. Whoever by words either spoken or intended to be read, or by signs, or by visible representation or otherwise, excites or attempts to excite feelings of disaffection of the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine. (*Information compulsory, vide Section 89, C. C. P.*)

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.

This explanation leaves the Court the almost impossible task of drawing the line between that disapprobation which is legal and that which is not.

Section 13, Act XXVII of 1870. The following chapters of the Penal Code, namely, IV and V, shall apply to offences punishable under this Section 124A.

Section 14, Act XXVII of 1870. No charge of an offence punishable under this Section 124A shall be entertained in any Court unless the prosecution be instituted by order of, or under authority from, the Local Government.

This Section 124A was inserted into Act XLV of 1860 by Section 5, Act XXVII of 1870.

Sections 121 to 130 of the Code deal with offences against the State. But no mention is made of seditious speaking or writing.

In the draft Code originally prepared by the Indian Law Commissioners, and published in 1837, appeared a section resembling this section, and its omission from the Code as ultimately enacted was due, it is believed, to a mere oversight. Attempts to excite disaffection to the Government by words or writing are now punishable only when they can be proved to amount to abetments of the offence of waging war against the Queen; and as this proof implies the actual existence of war, and must often be a matter of extreme difficulty, it was therefore desirable that some such provision should become part of the law of British India: accordingly this section has been added.

"This section is substantially the same as the law of England at the present day, though much compressed, much more distinctly expressed, and freed from a great amount of obscurity and vagueness with which the law of England was hampered. . . . The law of England on this subject consisted of three parts. There was, first, the Statute, commonly called the Treason Felony Act (technically the 11th Vic. chap. 12); secondly, the common law with regard to seditious libels; and thirdly, the law as to seditious words. In regard to this law, Section 2 of the Penal Code enacted, that every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof. Hence, the criminal law which prevailed before the passing of the Penal Code was still in force as to such offences as the Code did not punish. . . . In the Presidency towns the criminal law of England was still in force, except in so far as it was superseded by the Penal Code. Any person who, within the Maharatta ditch or in Bombay or Madras, wrote anything which at common law would be a seditious libel, would be liable to the penalties which the law of England inflicted, which were fine and imprisonment at least, to say nothing of whipping and pillory. . . . As for the Mofussil, it appeared that the Mahomedan criminal law prevailed so far as it was not superseded by the Penal Code. There was nothing to be found in the Mahomedan law on the subject of seditious libel, but much on the subject of rebellion, which, however, was so vaguely expressed, that it might possibly justify the infliction of very strange penalties for sedition and libel.

"The second part of the English criminal law on this subject was the common law with regard to seditious libels. The law was very vaguely expressed, and it was to be hoped that some one might soon reduce to a few short sentences the great mass of dicta on the subject. It was infinitely stronger than anything now proposed in the present amendment of the Penal Code." (Mr. Stephen's speech, see pp. 1314—1317, *Gazette of India*, 3rd December 1870.)

[*Cl. of S.*]

[*Unco. Not bail-
able.*] [*Warrant.*]

* 125. Whoever wages war against the Government

Waging war against any Asiatic power in alliance with the Queen. (17) of any Asiatic power in alliance or at peace with the Queen (13), or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life, to which fine may be added ; or with imprisonment of either description (53) for a term which may extend to seven years, to which fine may be added ; or with fine. (*Information compulsory, vide* Section 89, C. C. P.)

The extent of the operations of this section appears doubtful. In dealing with it, the fact that it is an enactment prior in time to the Stat. 28 & 29 Vic., c. 17, and 32 & 33 Vic., c. 98, should be remembered.

[*Cl. of S.*]

[*Uncog. Not bailable.*] [*Warrant.*]

* 126. Whoever commits *depredation*, or makes preparations to commit depredation, on the territories of any power in alliance or at peace with the Queen (13), shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine, and to forfeiture of any property used, or intended to be used, in committing such depredation, or acquired by such depredation. (*Information compulsory, vide* Section 89, C. C. P.)

Depredation.—The act of robbing, a plundering, a pillaging. Waste ; consumption ; a taking away by any act of violence. *Depredation* or *Hership* in *Scots law* is the offence of driving away numbers of cattle or other bestial by the masterful force of armed persons (I.D. 534).

[*Cl. of S.*]

[*Uncog. Not bailable.*] [*Warrant.*]

* 127. Whoever receives *any property*, knowing the same to have been taken in the commission of any of the offences mentioned in Sections 125 and 126, shall be punished with imprisonment of either description (53), for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

Property.—The word “property” is not defined in the Chapter of Definitions. “Movable property” is defined see section 22, *ante*, but

this latter term is included in the word here used "property," this latter term being more extensive than the former term which it includes. Section 7, *ante*, says, every expression which is *explained* in any part of this Code, is used in every part of this Code in conformity with the explanation; but as the term property is not explained in this Code we must go elsewhere for the definition. For certain legal definitions of the word *property*, see notes to section 22, *ante*. By section 465 C. C. P., a charge of an offence under this chapter VI shall not be entertained by any Court, unless instituted by the authority laid down in Section 465 C. C. P.; to the rule therein laid down this section is the only exception.

[*Ct. of S.*]

[*Uncog. Not bail-
able.*] [*Warrant.*]

* 128. Whoever, being a public servant (21), and having the custody of any State Prisoner or Prisoner of War, voluntarily (39) allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

* 129. Whoever, being a public servant (21), and having the custody of any State Prisoner or Prisoner of War, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

With reference to this and the preceding section, it is sufficient to prove that the accused acted in the capacity described; it is unnecessary to prove his appointment as the maxim "*omnia præsumuntur rite et solemniter esse acta, donec probetur in contrarium*" applies; and in this Section 129, it is unnecessary to prove the negligence as the law will imply it (1 Hale, 600). The accused can disprove the negligence by showing that the prisoner rescued himself by force or was rescued by others.

[*Ct. of S.*]

[*Uncog. Not bail-
able.*] [*Warrant.*]

* 130. Whoever knowingly aids or assists any State

Aiding escape or rescuing or harbouring such prisoner. Prisoner or Prisoner of War in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, *or harbours* or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Explanation.—A State Prisoner or Prisoner of War who is permitted to be at large on his parole within certain limits in British India (15), is said to escape from lawful custody, if he goes beyond the limits within which he is allowed to be at large.

Or Harbour.—Section 216 P. C. also deals with the offence of harbouring an offender who has escaped from custody. It appears from the case of *Reg. v. Jarvis* that to employ another person to harbour an offender makes the employer guilty in like manner, as though he himself harboured the offender. By the English law any party knowingly aiding escape, receiving, concealing, or harbouring the offender, would be an accessory after the fact.

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

The provisions of this chapter relate to the punishment of persons who not being Military, abet Military crimes. The laws to which the Army and Navy are specially subject are excepted (see Sections 5 and 139, P. C.) It is because the general law regarding abetting of offences will not reach a person who encourages those who are subject to Military law to commit breaches of discipline, that this chapter has been framed. From the severity of Military Penal Law, justified by the circumstances of those for whom it is intended, the principle of the general law of abetment which punishes the abettor with a penalty equal or proportionate to that to which the person who commits the offence is liable, could not be followed in cases of this kind. The design is to provide for the punishment

of offences of this sort in a manner more consistent with the general character of the Code. But it must be borne in mind that an offence (40) committed by a soldier or sailor, if not coming under the exception of Sections 5 and 139 P. C., is punishable under this act, and whoever abets such soldier or sailor in such offence, is punishable under general provisions of Penal Code.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83 P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment, but whipping may be inflicted for *first or any other* offence, and is to be administered in the way of school discipline with a light rattan (para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *transportation*, or *penal servitude* or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

* 131. Whoever abets (107) the committing of mutiny by an officer, soldier, or sailor in the Army or Navy of the Queen (13), or *attempts to seduce* any such officer, soldier, or sailor from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Abetting mutiny, or attempting to seduce a soldier or sailor from his duty.

Explanation.—In this section the words “officer” and “soldier” include any person subject to the Articles of War for the better government of Her Majesty’s Army or the Articles of War contained in Act V of 1869.

This explanation to Section 131 was added by Section 6, Act XXVII of 1870.

Or Attempts to Seduce.—This section provides for attempts to seduce “soldiers” from duty. Looking to the wide application of the present Native Articles of War (Act V of 1869), Mr. Stephen in his Bill published in the *Gazette of India*, dated 3rd September, 1870, proposed, by addition of the “*explanation*” added to this section, to extend the provisions of this section to non-combatants attached to and serving with the Army. This Bill subsequently passed into law as Act XXVII of 1870.

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

132. Whoever abets (107) the committing of mutiny by

Abetment of mutiny,
if mutiny is committed
in consequence there-
of.

an officer, soldier, or sailor in the Army or Navy of the Queen (13), shall, if mutiny be committed in consequence of that abetment, be punished with death (46) or with transportation for life, or imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

[*Ct. of S., or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

* 133. Whoever abets (107) an assault (351) by an officer, soldier, or sailor in the Army or Navy of the Queen (13), on any superior officer being in the execution of his office, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

Abetment of an as-
sault by a soldier or
sailor on his superior
officer, when in the
execution of his duty.

[*Cog. Not bailable.
[Warrant.]*]

[*Ct. of S.*]

* 134. Whoever abets (107) an assault (351) by an officer, soldier, or sailor in the Army or Navy of the Queen (13), on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Abetment of such
assault, if the assault
is committed.

[*Cog. Bailable.
[Warrant.]*]

[*M. of 1st or 2nd
Class.*]

* 135. Whoever abets the desertion of any officer, soldier, or sailor in the Army or Navy of the Queen (13) shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Abetment of the de-
sertion of a soldier or
sailor.

[*Cog. Bailable.
[Warrant.]*]

[*M. of 1st or 2nd
Class.*]

* 136. Whoever, except as hereinafter expected, know-

Harbouring a deserter. ing or having reason to believe (26) that an officer, soldier, or sailor in the Army or Navy of the Queen (13) has deserted, harbours such officer, soldier, or sailor, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

There is no definition in the Penal Code of “harbouring,” neither has Wharton in his Law Lexicon any definition of this term. Webster gives “Harbor, V. I.,” to entertain as a guest, to shelter, to protect.

“Any place that *harbours* men.”—*Shakespeare*.

Harbour V. I., to lodge or abide for a time, to receive entertainment, to take shelter.

“For this night let’s *harbour* here in York.”—*Shakespeare*.

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

* 137. The master or person in charge of a merchant vessel on board of which any deserter from the Army or Navy of the Queen (13) is concealed shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees if he might have known of such concealment, but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel. (*Triable summarily under Section 222, C. C. P.*)

Deserter concealed on board a merchant vessel through negligence of master.

[*M. of 1st or 2nd Class.*]

[*Cog. Bailable.*
[*Warrant.*]

* 138. Whoever abets (107) what he knows to be an act (33) of insubordination by an officer, soldier, or sailor in the Army or Navy of the Queen (13), shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine, or with both. (*Triable summarily under Section 222, C. C. P.*)

Abetment of act of insubordination of a soldier or sailor.

139. No person (11) subject to any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy, is subject to punishment, under this Code, for any of the offences defined in this chapter.

Persons subject to Articles of War not punishable under this Code.

[Cogn. Bailable.]
[Summons.]

[Any Mag.]
* 140. Whoever, not being a soldier in the Military or Naval service of the Queen (13), wears any garb, or carries any token resembling any garb or token used by such a soldier, *with the intention that it may be believed that he is* such a soldier, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

With the Intention, &c.—The gist of the offence herein made penal is the intention of the accused wearing the dress of a soldier for the purpose of inducing others to believe that he is in the service at the present time, and not merely to show that he was formerly a soldier, but is not one now. To fraudulently obtain property by wearing an assumed dress, soldier's, policeman's, chuprassy's or others, would be punishable under Section 415, I. P. C.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 8, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment, but whipping may be inflicted for *first or any other* offence, and is to be administered in the way of school discipline with a light rattan (para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death or transportation or penal servitude* or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

An *unlawful assembly* under English law is when three or more do assemble themselves together to do an unlawful act. A *riot* is where three or more meet to do an unlawful act upon a common quarrel. Unlawfully assembling, if to the number of twelve, may constitute a felony; but from the number of three to eleven the offence is a misdemeanor, punishable by fine and imprisonment only, to which hard labour may be added (Black. Com., 154).

141. An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is—

Firstly. To *overawe* by criminal force (350), or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any public servant (21) in the exercise of the lawful power of such public servant; or

To carry a conviction under this head, the common object of the persons composing the assembly must have been to *overawe* such public servant; the mere fact that their action did *overawe* such public servant is not in itself sufficient.

Secondly. To resist the execution of any law or of any legal process; or

Thirdly. To commit any mischief (425) or criminal trespass (441), or other offence (40); or

Fourthly. By means of criminal force (350), or show of criminal force, to any person (11) to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other *incorporeal* right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Rights of way, rights of fishing, rights and profits annexed to and issuing out of land, rights of common pasturage, and rights incident to chattels, such as patent rights and copyrights, are in English law termed "*incorporeal*" (2 Stephen's Com. 9). Hale gives the enumeration of incorporeal hereditaments as follows:—Rents, services, tithes, commons, and other profits *in alieno solo*, pensions, offices, franchises, liberties, villeins, dignities; but Blackstone gives ten principal kinds:—Advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents (Com. 1, 21).

Such rights may consist in their enjoyment or use and not in the actual

possession of the tangible property, and in so far as this is the case, the term possession means acknowledged use and exercise or enjoyment of such privilege. There is nothing in this clause limiting the term right to rights in immovable property only.

Fifthly. By means of criminal force (350), or show of criminal force, to compel any person (11) to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

This clause takes in the infringement by an unlawful assembly of any right whatever that a man possesses; omission as well as commission are both included.

Explanation.—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly (141).

From the wording of this *Explanation* it is obvious that there is no ground for making any distinction between an unlawful assembly as a pre-meditated act, and an affray as a sudden one, as an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

Where, of several persons constituting an unlawful assembly, some only are armed with sticks, and one of them not so armed picks up a stick and uses it, B, his master, who gives a general order to beat, is guilty of abetting the assault made by such a one (12 W. R., 51).

With reference to placing eight men on trial, and discharging twenty-four without trial, on the ground that no specific outrage was proved against the men discharged, was held by the Judicial Commissioner, Oudh, to be an untenable argument, and objectionable as being neither just to the public nor to the accused. The authors of the Penal Code, knowing that such technical objections might be produced in favour of rioters, have provided against them. In riots between Hindoos and Mahomedans, or between landlords and tenants, it is almost impossible to obtain reliable evidence regarding the conduct of each individual rioter, and if we once admit the above argument (objected to by Judicial Commissioner) we shall find the greatest difficulty in putting down agrarian and religious riots.

Section 149, P. C., distinctly declares that every member of an unlawful assembly is to be held guilty of any offence committed in prosecution of a common object.

Section 151 provides punishment for knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.

Sections 142 and 143 provides for the punishment of all persons who

may join in a riot and assist rioters by their countenance (J. C. O., Circular 18 of 1869).

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined, when the thing made punishable is punishable by such law with imprisonment for a term of six months or upwards, with or without fine.

142. Whoever, being aware of facts which render any
Being a member of assembly an unlawful assembly (141), in-
an unlawful assembly. tententially joins that assembly, or con-
tinues in it, is said to be a member of an unlawful
assembly.

To convict a prisoner of being a member of an unlawful assembly, and of culpable homicide not amounting to murder, it must be shown that he had illegal object in common with, and took part in, the illegal act done by others (1 W. R., 20).

[Any Mag.]

[Cog. Bailable.]
[Summons.]

* 143. Whoever is a member of an unlawful assembly
(141) shall be punished with imprisonment
Punishment. of either description (53) for a term which
may extend to six months, or with fine, or with both.
(*Triable summarily* under Section 222, C. C. P.)

An assembly lawful in its inception may become unlawful by its acts. If force is used the higher offence of rioting has been committed (1 W. R., 19).

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

* 144. Whoever, being armed with any deadly weapon,
Joining an unlawful or with anything which, used as a weapon
assembly armed with of offence, is likely to cause death (64),
any deadly weapon. is a member of an unlawful assembly,
shall be punished with imprisonment of either description
for a term which may extend to two years, or with fine, or
with both.

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

* 145. Whoever joins or continues in an unlawful as-

Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse. sembly, knowing that such unlawful assembly (141) has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

146. Whenever force (349) or violence is used by an unlawful assembly (141) or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting (146).
Force used by one member in prosecution of the common object.

Under English law a *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel (4 Black. Com., 154).

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

* 147. Whoever is guilty of rioting (146) shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.
Punishment for rioting.

Persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting armed with deadly weapons, culpable homicide, and grievous hurt (3 H. C. R. N. W., 174).

A dismissal by one Court of a charge of riot against A may be a bar to A's trial by another Court on the same charge, but it does not extend to other persons not then before the Court which ordered the dismissal. The dismissal by one Court of the charge of riot instituted by the police is no bar to the trial by another Court of a charge of criminal trespass instituted by a third person, although the two charges may substantially refer to the same occurrences (6 W. R. C. R., 51).

There cannot be a conviction of both "rioting" and being "members of an unlawful assembly." The greater charge includes the less, and to punish under both sections would be cumulative and illegal (1 W. R., 7).

Where a man is grievously wounded in a riot, the police are bound to act without taking into consideration who was the aggressive party. In the absence of any proof that they exceeded their duty, the police were held to be entitled to the protection of the Court (8 W. R., 36).

[Ct. of S., or M. of 1st Class.]

[Cog. Bailable.]
[Warrant.]

* 148. Whoever is guilty of rioting, being armed with

Rioting armed with a deadly weapon (148), or with anything a deadly weapon. which, used as a weapon of offence (40), is likely to cause death (46), shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

The prisoners who, in resisting a sudden attack made upon them by certain persons, for the purpose of cutting their crop, and when they had no time to complain to the police, inflicted a wound on one of them with a bamboo, from the effects of which the man died, were convicted by the Sessions Judge under Sections 148 and 304. The High Court acquitted the prisoners, holding that the force used, or the injuries inflicted, were not such as to exceed their right of private defence of property (VI, B. L. R., 9 App.).

148, 149, 234. Rioting armed with deadly weapons is a distinct offence from stabbing a person on whose premises the riot takes place, and each is separately punishable (*Queen v. Kalachund, &c.*, H. Ct. Calcutta, 29th April, 1867).

[Ct. by which offence is triable.]

[According as arrest may be made without warrant for offence or not. According as offence is bailable or not.]

[According as warrant or summons may issue for the offence.]

*149. If an offence (40) is committed by any member of an unlawful assembly (141) in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence.

Is committed.—It should be noted that in this section the present tense “is” is emphatically used, so that no loophole can exist. The Code here follows the exact principle of English Criminal Law. In treating of unlawful assemblies, the law does not, as in other cases, recognize principal and accessory; it treats of all as uniting in one crime, and holds all liable to punishment: all are principals. The reading of the proclamation, for example, in the Riot Act makes *all* present in the crowd, who do not disperse within the space of one hour guilty of riot, *i. e.*, of felony.

A case very parallel to that of *Golam Arfin*, decided in February, 1870, at Calcutta and quoted below, is to be found in 1 Hale, P. C.—the “*Sissinghurst House case*”—a most important and frequently quoted case. In that case at the trial before the King’s Bench, the following points

were unanimously resolved :—(1.) That in law, the stroke which killed, whoever gave it, was the stroke of all the party (following the resolution in an old case, *Macally's*, in 9 Coke's Reports); and (2) that in this case, all that were present and assisting the rioters were guilty of the death of the party slain, though they did not all actually strike him, or any of the constables of the company. So again in the time of Charles the Second, where five robbers, being pursued, one of the five turned on his pursuers, the rest being in the same field and having often resisted the pursuers, and refusing to yield, killed one of the pursuers, the Judges, five in number, ruled, *inter alia*, that inasmuch as all the robbers were of a company and made a common resistance, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from the murderer, were all principals aiding and abetting in the perpetration of the crime.

The main idea running through the Common Law of England and the provisions of the Penal Code, is that, where a deliberate intention exists to commit a crime, and a number of men band themselves together for carrying out that intention into execution, the intention constitutes the guilt, and all those who take part in it become equally guilty by the mere fact of lending their aid or presence, be it merely acting or assenting while the perpetration of the offence is progressing. In the Calcutta case of Golam Arfin, though the murdered girl met her death from one man's hand, yet as will be seen on referring to the terse words of Loch, J., the law assumes that all those present aiding and abetting were prepared to use the lethal weapon, therefore they all brought themselves within the power of the law, and Baron Alderson (*in re R. v. Vincent*, Roscoe Cr. Ev.), says, "Any meeting assembled under such circumstances, as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly, and in viewing this question, the jury should take in consideration the way in which the meetings were held, the hour at which they meet, and the language used by the persons assembled, and by those who addressed them, and then consider whether firm and rational men having their families and property there would have reasonable ground to fear a breach of the peace, as the alarms must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage," and Littledale, J. in *R. v. Neale*, ruled, that *all* persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and *all who gave countenance and support to it*, are criminal parties." Were any partition of wrong allowed in cases like unlawful assemblies, the danger to law and order would be such as to baffle description (3 M. J., VI. 85—88).

Every person who, at the time of the committing, &c.—A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction was wounded and retired to the side of the road, taking no further active part in the affray; after his retirement a member of the second faction was killed.

Held by Norman, J. (whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and that he could not under Section 149 be made liable for the subsequent murder.

Held by Jackson, J., that he remained a member of the unlawful assembly (3 B. L. R., part xii, 1).

In prosecution of the common object.—A charge under this section should state the common objects of the unlawful assembly, in prosecution of which an offence was committed by one member, so as to render *all* liable to such offence (1 R. C. C. R., 3).

Where a woman was killed by a member of an unlawful assembly, in prosecution of the common object of that assembly, the common object being the abduction of that person's mother, *held* that all those who were members of the assembly at the time such person was killed, were guilty of the offence of killing her (4 B. L. R., 46).

[By Ct. by which
offence is punishable.]

[According to the
offence committed by
the person hired, en-
gaged, or employed.]

[Cog. According
as offence is bailable
or not.]

*150. *Whoever hires, or engages, or employs, or promotes, or connives at the hiring, engagement, or employment of any person to join or become a member of any unlawful assembly (141), shall be punishable as a member of such unlawful assembly, and for any offence (40) which may be committed by any such person (11) as a member of such unlawful assembly, in pursuance of such hiring, engagement, or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.*

Whoever Hires.—The hiring here alluded to must be complete to bring the parties under the provisions of this section, and, therefore, when the hiring is not so complete, the offence will come under this Section and 511, I. P. C. Section 158 of the Code deals with a similar offence to that contained in this section, viz., the being hired to take part in an unlawful assembly or riot, the difference in the two sections appears to lie in that this refers to the hirer and that to the hired, this to a complete hiring, that to even an attempt at being hired. The attempt at the offence mentioned in this section is punishable under 511, P. C.; the attempt under Section 158, and punishment for same is contained in the section itself.

[Any Mag.]

[Cog. Bailable.]
[Summons.]

*151. *Whoever knowingly joins or continues in any*

Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse. assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

Explanation.—If the assembly is an unlawful assembly within the meaning of Section 141, the offender will be punishable under Section 145.

Vide note on Section 141. It is obvious that in almost every case of riot, one or other of the opposing parties must have been the aggressors ; and in many instances one of the factions are perhaps acting in strict self-defence of their property. To find out the real cause of the riot, and consequently to ascertain which side were the original wrong-doers, is often difficult, and always troublesome, and yet, unless this is done, justice cannot be properly done either (J. C. O., Circular 32 of 1869).

Besides the clear wording of this section, the explanation indisputably shows that the punishment here awarded and the offence contemplated is the disobedience of a lawful command to disperse ; the assembly of five or more persons need not necessarily be an unlawful assembly ; *e. g.*, Five persons going along the road, not together, but singly, come upon A and B wrangling and fighting, they stop and look on ; the constable on the beat fears a disturbance of the public peace, and orders the spectators to move on or disperse. Disobedience to such a command is here contemplated.

[*Ct. of S., or M. of 1st Class.*]

[*Cog. Bailable.*
[*Warrant.*]

*152. Whoever assaults (351), or threatens to assault, or obstructs or attempts to obstruct any public servant (21) in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly (141), or to suppress a riot (146) or affray (159), or uses, or threatens, or attempts to use criminal force (350), (511) to such public servant, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Assaulting or obstructing public servant when suppressing riot, &c.

[*Any Mag.*]

[*Cog. Bailable.*
[*Warrant.*]

*153. Whoever *maliciously* or *wantonly*, by doing any-

Wantonly giving provocation, with intent to cause riot. If rioting be committed.

thing which is illegal, gives provocation to any person, intending or knowing it to be likely that such provocation will cause the offence of rioting (146) to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description (53) for a term which may extend to one year, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both. (*Triable summarily under Section 222, C. C. P.*)

Whoever malignantly.—In this section I presume that malignantly and maliciously are practicably synonymous terms; malice or *malitia* in its legal sense denotes a wrongful act done intentionally without just cause or excuse. Per Littledale, J., in *Macpherson v. Daniels* (10 B. & C., 272), "We must settle what is meant by the term malice, said Best, J., in *Reg. v. Harvey* (2 B. & C., 268). The legal import of this term differs from its acceptance in ordinary conversation. It is not as in ordinary speech only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind (Roscoe, 21). Malice is either *express*, as when one with a deliberate mind and formed design kills another, which design was evidenced by certain circumstances discovering such intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm; or *implied*, as where one wilfully poisons another in such a deliberate act, the law presumes malice though no particular enmity can be proved. The nature of implied malice is illustrated by the maxim '*culpa lata dolo et qui paratur*.' When negligence reaches a certain point, it is the same as intentional wrong; every one must be taken to intend that which is the natural consequence of his actions" (W. L. L., 584). Webster in his Dictionary says that the adverbs maliciously and malignantly are synonymous.

Or Wantonly.—*Wantonly* means without regularity or restraint, may mean (illegally) sportively, gaily, playfully, unintentionally. This latter word "*wantonly*" gives to the offence contained in this section a far larger, vaguer and more comprehensive scope, than would be implied by the word "*malignantly*" standing by itself.

[M. of 1st Class or
2nd Class.]

[Uncog. Bailable.]
[Summons.]

*154. Whenever any unlawful assembly (141) or riot (146) takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an

Owner or occupier of land on which an unlawful assembly is held.

interest in such land, shall be punished with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe (26) it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest Police Station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly. (*Triable summarily* under Section 222, C. C. P.)

In a charge under this section this offence specified in this section ought to be clearly and distinctly specified. After such charge the prisoner should be called on to plead, and if his plea is not guilty, then legal evidence for the prosecution should be gone into. The record of the original riot case is no evidence itself for conviction under this section. This separate evidence in support of the charge under this section being given, and a *prima facie* case made out for the prosecution, the prisoner must then be allowed opportunity to rebut that evidence, after which judgment should be passed (15 W. R. 6).

[M. of 1st Class or
2nd Class.]

[Uncog. Bailable.]
[Summons.]

* 155. Whenever a riot (146) is committed for the benefit or on behalf of any person (11) *who is the owner or occupier of any land* respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, *if he or his agent or manager, having reason to believe* that such riot was likely to be committed, or that the unlawful assembly (141) by which such riot was committed was likely to be held, shall not respectively *use all lawful means* in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same. (*Triable summarily* under Section 222, C. C. P.)

*The owner or occupier of any land * * * if he or his agent or manager had reason to believe.*—The mere fact that a person is the owner or occupier of land, in respect of which, or upon which, a riot takes place, is not sufficient to raise a presumption against him. It must be positively

proved that he or his agent or manager knew or had reason to believe that the riot would be committed, and having that knowledge or belief, did not use all lawful means in his power to prevent, disperse, or suppress it (12 W. R., 75).

Under these sections the owner is liable for the negligence of his agents. As a zemindar cannot avoid his duties and liabilities, it is his business to appoint fit and proper persons to manage his local affairs, and to perform the duties imposed on him by the legislature; but a zemindar cannot be held responsible under this section when the riot is sudden and unpremeditated and he resides at a distance (5 R. J. P. J., 44).

Use all Lawful Means.—Section 154 deals with cases of unlawful assembly or riot, taking place on land, and makes the owner, occupier, agent, or manager, liable to punishment, if, knowing of the said unlawful assembly or riot, they do not at once report it to the nearest Police Station, and do all in their power to prevent and stop it. Sections 155 and 156 deal with riots committed for the benefit of the owner of the land on which the riot takes place. In these three Sections, 154, 155, and 156, the following five facts must be proved to procure a conviction; (1) that riot took place on accused's land; (2) that he as owner or occupier had the right and power to interfere; (3) that he knew or had reason to believe of the intended or actual riot; (4) that he never gave the necessary information to the principal officers at the nearest Police Station; and (5) that he never used all lawful means to stop the assembly or the riot.

*M. of 1st Class or
2nd Class.]*

*[Unrecog. Bailable.]
[Summons.]*

* 156. Whenever a riot (146) is committed for the benefit or on behalf of any person (11) who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, the agent or manager of such person shall be punishable with fine, *if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place, and for suppressing and dispersing the same.* (*Triable summarily under Section 222, C. C. P.*)

If such agent or manager, having reason to believe.—Under this, as under the two preceding sections, it is essential to prove that the agent as such agent knew of possibility of the riot, and did not try to prevent it.

These sections apply to those cases where rival landowners hire men and arm them with lathies or induce them to bring their lathies to attack each other's cultivation, on account of some dispute between the landowners. The mere fact of agency or ownership or occupancy is not sufficient to raise a legal presumption against the individual agent, owner, or occupants. The facts mentioned in the note under the preceding section *in re Queen v. Suroop Chunder Paulet and Heralal* must be independently proved.

[*M. of 1st Class or
2nd Class.*]

[*Cog. Bailable.
[Summons.]*]

* 157. Whoever harbours, receives, or assembles in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have hired, engaged, or employed, or are about to be hired, engaged, or employed, to join or become members of an unlawful assembly (141), shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with, fine, or with both.

[*M. of 1st Class or
2nd Class.*]

[*Cog. Bailable.
[Summons.]*]

* 158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine, or with both (*triable summarily* under Section 222, C. C. P.); and whoever,

[*M. of 1st Class or
2nd Class.*]

[*Cog. Bailable.
[Warrant.]*]

being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death (46), shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

* 159. When two or more persons, by fighting in a

Affray. public place, disturb the public peace, they are said to "commit an affray."

To support a prosecution for an affray, the prosecutor must prove : 1st, the affray or fighting ; 2nd, that it was in a public place ; 3rd, that it disturbed the public peace ; and 4th, that two or more persons were engaged in it.

The proof required by English law is similar, only altering 3rd, "disturbing the public peace" to "that it was to the terror of the king's subjects." Affray differs from a riot in not being premeditated. Thus, if a number of persons meet together at a fair or market, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but only of an affray, because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention (Roscoe, 6th edition, 253).

Affrays (from *affraier* to terrify) are the fighting of two or more persons in some public place to the terror of Her Majesty's subjects ; for if the fighting be in private, it is no *affray*, but an *assault*. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever the consequence may ensue. The punishment of common affrays is by fine and imprisonment (4 Black. Com., 153).

[Any Mag.]

[Uncog. Bailable.]
[Summons.]

* 160. Whoever commits any affray (159) shall be punished with imprisonment of either description (53) for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Punishment for the commission of an affray.

By English law affrays are misdemeanors, and the definition of an affray is much the same as that given here in Section 159 P. C. If the fighting be in private, it is no affray, but an assault. All persons countenancing an affray are guilty of a misdemeanor.

CHAPTER IX.

OF OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS.

This chapter was framed so as to punish offences committed by public servants, also offences relating to public servants, though not committed by them. For definition of public servant, see Section 21, P. C. The offences common between public servants and the mass of the community are left to the general provisions of the Code, because the Law Commissioners were of opinion "it was desirable that the property of the State should, in general, be protected by exactly the same laws which were considered sufficient for the protection of the property of the subject." Therefore, if A, a public servant, embezzles, he can be dealt with under the provisions of Section 405, P. C. Certain kinds of misconduct on part of public servants deserving of punishment are not provided for in the Code. Again, the punishments provided in this chapter are not proportionate "either to the evil which the abuse of power produces, or to the depravity of a man who, having been entrusted with power for the public benefit, employs that power to gratify his own cupidity and revenge." And the reason why the punishments awarded in this chapter are not so severe as the punishments awarded in the other penal clauses of the Code is because, "in general, a penal clause sets forth the *whole* punishment which can be inflicted on an offender by any public authority, and no power in the State can make any addition to it. Whereas the penalty for an offence committed by a public functionary in the exercise of his public functions has been fixed on the supposition that it will often be only a part, and a small part, of the penalty he will suffer;" for, besides what is laid down in the Code, he may be censured, suspended, or dismissed, &c., &c. With reference to the criminal liability of public servants, Lord Mansfield in *re R. v. Bembridge*, laid down two principles for guidance;—1st. If a man accepts an office of trust and confidence concerning the public, especially when attended with profit, he is answerable to the Crown for his execution of that office, and, if so, he can only be answerable in a criminal prosecution, for the Crown cannot otherwise punish his misbehaviour. 2nd. Where there is a breach of trust, a fraud or imposition in a matter concerning the public, which, as between subject and subject, would only be actionable, yet as it concerns the Crown and the public, it is indictable.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment; but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline with a light rattan (para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death*

or *transportation*, or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

In re R. v. Vina'yak Diva'kar the Bombay High Court ruled that the Local Government in sanctioning or directing a charge against a public servant has power to limit its sanction, by giving directions as to the person by whom, and the manner in which the prosecution is to be prepared and conducted; and a Court has no jurisdiction to entertain a charge against a public servant if prepared otherwise than in accordance with such directions. The Local Government has power in the like case to direct that the accused public servant shall be tried before a specified tribunal, being one having jurisdiction in that behalf (8 Bo. H. C. R., 32). As to limiting sanction, see *R. v. Subi Sani*, 8 Bo. H. C. R., 28; *R. v. Lai*, 8 Bo. H. C. R., 24; *R. v. Posa Ram*, 6 W. R., 11; *R. v. Kartich Chunder Holka*, 9 *ib.*, 58; *R. v. Kador Bua*, 11 *ib.*, 17; *R. v. Dwarkanath Bose*, 2 *ib.*, 31; *R. v. Gohn Chunder Gluuse*, 10 *ib.*, 41; *R. v. Ooma Moyer Dehea*, 13 *ib.*, 25.

In the definition of legal remuneration contained in this section, the word "Government" shall, for the purpose of Act XXXI, 1867, be deemed to include a Railway Company. (See note on Section 21.)

A Judge or public servant removable from his office only by order of the Government cannot be prosecuted as such without the sanction of the Government or some other competent authorized authority (*vide* Code of Criminal Procedure). As regards Police Officers, see Act V, 1861, Section 42.

[*Ct. of S., or M. of
1st Class.*]

[*Uncog. Bailable.
Summons.*]

* 161. Whoever, being or expecting to be a public servant (21), accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or dis-service to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—"Expecting to be a public servant." If

a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating (415), but he is not guilty of the offence defined in this section.

“Gratification.” The word “gratification” is not restricted to pecuniary gratifications, or to gratifications estimable in money.

“Legal remuneration.” The words “legal remuneration” are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government which he serves to accept.

“A motive or reward for doing.” A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations.

(a.) A, a Moonsiff, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section.

(b.) A, holding the office of Resident at the Court of a subsidiary power, accepts a lakh of rupees from the Minister of that power. It does not appear that A accepted this sum as a motive or reward for doing, or forbearing to do, any particular official act, or for rendering or attempting to render any particular service to that power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that power. A has committed the offence defined in this section.

(c.) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

The Law Commissioners observe :—“The punishment of fine will, we think, be found very efficacious in cases of this description, if the Judges exercise the power given them, as they ought to do, and compel the delinquent to deliver up the whole of his ill-gotten wealth.”

Under English law, it is an offence against public justice when a Judge or other person concerned in its administration takes any undue reward to influence his behaviour in his office; and this offence of taking bribes is punished, in inferior officers with fine and imprisonment, and in those

who offer a bribe, though not taken, the same. But in Judges, especially the superior ones, it has been always looked upon as so heinous an offence, that Chief Justice Thorpe was hanged for it in the reign of Edward III. (4 Black. Com., 145).

The taking a gratification by a Sheristadar to influence a Principal Sudder Ameen in his decisions, is sufficient to a legal conviction, whether the Sheristadar did or did not influence or try to influence the P. S. A. (3 W. R., 10).

Charge under this section should deal with separate motives in separate heads (5 R. J. P. J., 138).

A person who accepts a gratification for exerting his influence with a public servant, not as a public servant, but as a private individual, cannot be punished under this section (3 W. R. C. R., 19).

A peon of the Collector's Court, who received no fixed pay from the Government, but was remunerated by fees whenever employed to serve any process, and was placed on the register of supernumerary peons, had been ordered by the Magistrate to do duty on a particular day at the office of the Special Sub-Registrar, where he was detected receiving an eight anna piece from a person, and was prosecuted for receiving an illegal gratification as a public servant. *Held*, that the peon was a public servant under the definition of the ninth clause, Section 21, *ante* (7 W. R., 447).

[*Ct. of S., or M. of
1st Class.*]

[*Uncog. Bailable.
[Summons.]*]

* 162. Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification (161) whatever, as a motive or reward (161) for inducing, by corrupt or illegal means, any public servant (21) to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or dis-service to any person with the Legislative or Executive Government of India, or with the Government of the Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

If the evidence does not show the person or persons from whom the gratification was attempted to be taken, or taken, and the public servant who was to be influenced, a conviction cannot lie under this section (3 W. R., 69).

A person who accepts for himself or for some other person a gratification for inducing, by corrupt or illegal means, a public servant to forbear to do a certain official act, is punishable, not under Section 161, but under Section 162 of the P. C. (3 W. R., 10).

It is sufficient in this chapter to prove that such person acted as described; it is unnecessary to prove his appointment, for by the provisions of the Penal Code with respect to "public servants," the maxim "*omnia præsumuntur rite et solemniter esse acta, donec probetur in contrarium*," must alone prevail.

[*M. of 1st Class.*]

[*Uncog. Bailable.*
[*Summons.*]

* 163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification (161) whatever, as a motive or reward (161) for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant (21) to show favour or disfavour to any person, or to render or attempt to render any service or dis-service to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with simple imprisonment or for a term which may extend to one year, or with fine, or with both.

Illustration.

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust—are not within the section, inasmuch as they do not exercise or profess to exercise personal influence.

Mayne in his Commentary, 3rd edition, is of opinion that the "*personal influence*" referred to in this section means that influence which one man possesses over another irrespective of the merits of the case upon which it is brought to bear. Such considerations as rank, wealth, power, gratitude, relationship, or affection, may induce a person to grant the request of another; but influence exercised solely upon the merits of the case, would not be personal influence. If a person who was about to pay a visit to the Collector was to accept a sum of money on the understanding that he was to draw the Collector into conversation upon

the case, and represent it fully to him, such a proceeding, however indelicate and improper, would not come under this section, provided no personal feeling was brought into play.

[*Cl. of S., or M. of
1st Class.*]

[*Uncog. Bailable.
[Summons.]*]

* 164. Whoever being a public servant (21), in respect of whom either of the offences defined in the last two preceding sections is committed, abets (107) the offence, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Punishment for abet-
ment by public servant
of the offences above
defined.

Illustration.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

[*M. of 1st Class or
2nd Class.*]

[*Uncog. Bailable.
[Summons.]*]

* 165. Whoever, being a public servant (21), accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant, or having any connection with the official functions of himself or any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Public servant obtain-
ing any valuable
thing without consi-
deration, from person
concerned in any pro-
ceeding or business
transacted by such pub-
lic servant.

Illustrations.

(a.) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(b.) A, a Judge, buys of Z, who has a cause pending in A's Court, Government Promissory Notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c.) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

[M. of 1st Class or
2nd Class.]

[Uncog. Bailable.]
[Summons.]

* 166. Whoever, being a public servant, knowingly *disobeys any direction of the law* as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both. (See Section 217 *post.*)

In drawing up a charge under this section, the charge should contain the section of the Regulation or Act or law which was disobeyed (Letter No. 13 of 1865, 2 W. R.).

Disobeys any direction of the law, &c.—A, a Deputy Commissioner, believes B to be a robber or villain. A, without form of law, and knowing well that there is no such law, deports B from his district and puts him across the Ganges. A has committed the offence here defined, and is liable to simple imprisonment for one year. Judicial Officers are protected for something done in good faith, but should also bear in mind definition Section 52 (*vide* note on Section 52, page 82, Mr. Campbell's Circulars, J. C. O.).

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law with a knowledge that he is likely thereby to cause injury to Z, A has committed the offence defined in this section.

[Cr. of S., or M. of
1st Class.]

[Uncog. Bailable.]
[Summons.]

* 167. Whoever, being a public servant (21), and being,

Public servant framing an incorrect document with intent to cause injury. as such public servant, charged with the preparation or translation of any document, frames or translates that document (29) in a manner which *he knows or believes to be incorrect, intending thereby* to cause, or knowing it to be likely that he may thereby cause, injury to any person, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

A, a Court translator employed in a criminal case, mistranslates all the documents for the purpose of procuring the acquittal of the prisoner; he is not guilty under this section, but would come under Section 218 *post*. If he was bound by oath or solemn affirmation to translate the documents truly, he would come under Section 191 *post*. Where the mistranslation is done intentionally, and does produce injury, it will not be necessary to show intention to injure. "Where an act, in itself indifferent, if done with a particular intent, becomes criminal, then the intent must be proved and found; but when the act is of itself unlawful, that is, *prima facie*, and unexplained, the proof of justification or excuse lies on the defendant: and in failure, thereof, the law implies a criminal intent" (Mayne's P. C., 3rd edition, 101).

Which he knows, &c., intending thereby.—Injurious foreknowledge or intention must be established before a person can be held guilty under this section (5, Part III, 1865, A., N. W. P., 125).

[M. of 1st Class.]

[Uncog. Bailable.]
[Summons.]

* 164. Whoever, being a public servant (21), and being legally bound, as such public servant, not to engage in trade, engages *in trade*, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant unlawfully engaging in trade.

In Trade.—Definition of the word trade given by Wharton is exchange of goods for other goods or for money (W. L. L., 938).

33 Geo. III, chap, 52, sec. 137; 3 and 4 Wm. IV, chap. 85, sec. 76, forbids the Governor-General or Governor, any Member of Council, or any Collector, or other person, employed or concerned in the collection of the revenues or the administration of justice in the provinces of Bengal, Behar, and Orissa, or their agents or servants, or any one in trust for them, or any of the Judges of the Supreme Court, to be concerned in any trade or traffic within or without British India. Regulation II, 1793, prohibits the Board of Revenue to be concerned in any trade or commerce. Regulation XXV, 1803, prohibits any Collector or Assistant trading or

being concerned in any commercial transaction. Regulation II, 1814, prohibits Judges of Zillah Courts from being concerned in such transactions. Act VIII of 1855 prohibits the Administrator-General trading or trafficking for his own benefit. Regulation XX, 1817, prohibits Police Officers from trading or keeping any warehouse or shop within the limits of their Thannahs.

Section 61 and Section 137 from and including the words "nor shall it be lawful for any of His Majesty's subjects" to the end of the section, and Sections 155 and 159 of 33 Geo. III, chap. 52, were repealed by Section 1, Act XIV of 1870. Schedule Part I, and Section 157 of the said Statute repealed by Section 2, Act IV of 1871, and schedule thereto attached.

[M. of 1st Class.]

[Uncog. Bailable.]
[Summons.]

* 169. Whoever, being a public servant (21), and being legally bound, *as such public servant, not lawfully buying or bidding for property.* to purchase or bid for certain property, purchases or bids for that property, either in his own name or the name of another, or jointly or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

As such public servant not to purchase.—Where a Sub-Inspector of Police was charge with having purchased a pony which had been impounded, *held*, that the Magistrate should have proceeded under Section 19, Act I of 1871, taken with this Section of the Penal Code, and that the accused could not be convicted under Section 406 *post* (16, W. R., 52).

Regulation XXV, 1803, prohibits Native Officers and private servants and dependents of a Collector or an Assistant Collector from buying or bidding, directly or indirectly, for any land the Collector may dispose of at a public sale. Act X, 1859, prohibits Civil Court Ameens or other officers to buy any property sold by them under the said Act.

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

* 170. Whoever pretends to hold any *particular office as a public servant* (21), knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment

of either description (53) for a term which may extend to two years, or with fine, or with both.

Particular office as a public servant.—For conviction under this Section 170, both the officer and the person personated must exist. The offence would, it appears, be the same though the person personated was dead at the time the offence was committed.

A person pretending to be a Police Officer reprimanded some villagers with reference to the state of their roads, and obtained from them certain sums. He was convicted under this Section. The conviction was upheld.

False personation of soldier or seaman, so as fraudulently to receive their pay, is penal. But the evidence must show that there was some person of the name and character assumed, who was entitled to the wages attempted to be acquired (Roscoe, 430).

[Any Mag.]

[Cog. Bailable.]
[Summons.]

* 171. Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants (21) with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Vide Section 140, P. C. A similar offence is punished by that section with imprisonment of either description for three months, and with fine extending to five hundred rupees, or with both.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

By the provisions of this chapter, local authorities are empowered to forbid acts which they consider as dangerous to the public peace, health, safety, or convenience, and disobedience of such order is an offence; but before the disobedience of any such order can be looked upon as an offence, the Court before which the party disobeying the order is tried, must be satisfied that the offender is guilty of having done something tending to cause obstruction, annoyance, or injury to any person lawfully employed. Section 188 in this chapter provides a penalty for the infraction of an order promulgated by a Magistrate under Section 62, Act XXV of 1861. Referring to the former section, the Law Commissioners observe: "On the one hand, it is absolutely necessary to have some local rules which shall not require the sanction of the Legislature; on the other, there is great reason to apprehend much petty tyranny and vexation from such rules. . . . We have therefore thought it necessary to provide that no person should be punished merely for disobeying a local order, unless it be made to appear that the disobedience has been attended with evil or risk of evil."

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment; but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline with a light rattan (para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death*, or *transportation*, or *penal servitude* or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

[Any Mag.]

[Uncog. Bailable.]
[Summons.]

* 172. Whoever absconds in order to avoid being served with a summons, notice, or order proceeding from any public servant (21) legally competent, as such public servant, to issue such summons, notice, or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or if the summons, notice,

Absconding to avoid service of summons or other proceeding from a public servant.

or order is to attend in person or by agent, or to produce

[Any Mag.]

[Uncog. Bailable.]
[Summons.]

a document (29) in a Court of Justice (20), with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

This section applies to a *witness* who absconds to evade service of warrant issued under Sections 188 to 190, Act XXV of 1861, while Section 183, Act XXV of 1861, applies to a *party* who absconds (9 W. R., 70). In April, 1866, the Madras High Court ruled that a warrant was not to be served, but executed; and so a person absconding to prevent the execution did not come under this section.

A *party* absconding to avoid service of warrant cannot be convicted for such offence under this section. Such a case must be dealt with under Sections 183, 184, Act XXV of 1861 (1 C. C. R., 16).

From the wording of this section it appears that a person absconding on hearing that a summons against him was to be applied for, would not be guilty of an offence under this section; some action of a judicial nature is evidently requisite before the contempt contained in this section can be committed. A warrant addressed to a Police Officer to apprehend an offender and bring him before the Court "is not a summons, notice, or order" within the meaning of this section.

[M. of 1st Class or
and Class.]

[Uncog. Bailable.]
[Summons.]

* 173. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice, or other proceeding from any public servant legally competent, as such public servant (21), to issue such summons, notice, or order, or intentionally prevents the lawful affixing to any place of any such summons, notice, or order, or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed, or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or

Preventing service
of summons or other
proceeding, or pre-
venting publication
thereof.

[*M. of 1st Class or
2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

with both ; or, if the summons, notice, order, or proclamation is to attend in person or by agent, or to produce a document (29) in a Court of Justice (20), with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Intentionally prevents the serving on himself.—Refusing to sign a summons by an accused person does not constitute the offence of intentionally preventing the service of a summons on himself under this section (H. Ct. R., Crown Cases, 34, of 1868).

Intentionally prevents the lawful affixing, &c.—By the wording of this section a person can apparently be punished for disallowing a public servant duly authorized from affixing a summons at the offender's door-post, if it is thereby intended to obstruct public justice.

[*Any Mag.*]

[*Uncog. Bailable.*
[*Summons.*]

* 174. Whoever, being legally bound (43) to attend in person or by agent at a certain place and time, in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant (21), to issue the same, intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may

[*Any Mag.*]

[*Uncog. Bailable.*
[*Summons.*]

extend to five hundred rupees, or with both ; or if the summons, notice, order, or proclamation is to attend in person or by agent in a Court of Justice (20), with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Or Departs from the Place.—A fine can be imposed on a man, under this section, who, when summoned to answer a charge and verbally ordered to remain, disobeys that order (6 M. H. C. R., No. 779. M. J. 382).

Summons, Notice, Order, or Proclamation.—Accused were appointed arbitrators in a civil suit. They were summoned to attend the Court on a certain date, but disobeyed the summons. *Held* that the accused could not be convicted under this Section (174), as the summons in question was a process not provided by law (6 P. R., 1). The verbal order of a village Magistrate is a legal order, and disobedience of it may be punished under this section (7 M. J., 178).

Or Proclamation.—(3 Madras Jurist, No. II, 431.) Disobedience to a proclamation would be punishable under this section (R. C. C. R., Cir. 61). A magistrate can take cognizance of an offence under Section 174 committed against his own Court (8 W. R., 61).

Any Public Servant legally competent.—A Chairman of Municipal Commissioners appointed under Act XXVI of 1850, although a public servant, is not legally competent as such to issue an order for attendance before him. Accordingly, disobedience of such an order is not an offence under this section (Reg. v. Purshotam Valji, Bo. H. Ct. R., Crown cases, 33 of 1868). Section 1, Act XXVI of 1850 was repealed by Section 1, Act XIV of 1870, and Schedule Part II thereto attached.

A Mahalkari, invested with the powers of a 2nd Class Subordinate Magistrate, cannot issue a summons under Section 8 of Act XI of 1843, nor can a person be convicted under Section 174 for having disobeyed such a summons so issued.

To attend in Person in a Court of Justice.—This section does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of Civil Court (1 Bo. H. Ct. R., 38). But the Punjaub Chief Court have ruled differently, *in re* R. v. Heera Sing, it was *held* that this section applied to an escape from custody under a warrant in execution of the decree of a Civil Court. The J. C. O. in R. v. Shunker *held* that this section did not apply in such a case, but that Section 186 *post* did.

In consequence of the default of appearance of the person bailed, the surety was compelled to pay the penalty mentioned in the recognizance. The Deputy Magistrate applied for and received the permission of the District Magistrate to try the accused under this section. *Held* that the Deputy Magistrate had no jurisdiction to try the case, it not having been referred to him "either on complaint preferred directly to the Magistrate, or on the report of a Police Officer" (Section 273, Act XXV of 1861). *Held*, also, that notwithstanding Section 219, Act XXV, 1861, the accused might have been proceeded against under this section (1 I. B. L. R.).

Illustration.

(a.) A, being legally bound to appear before the Supreme Court at Calcutta, in obedience to a subpoena issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(b.) A, being legally bound to appear before a Zillah Judge as a witness, in obedience to a summons issued by that Zillah Judge, inten-

tionally omits to appear. A has committed the offence defined in this section.

[*Ct. in which the offence is committed subject to provisions of Chap. xxxii. C. C. P., or if not committed in a Court, a Mag. of the 1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

* 175. Whoever, being legally bound (43) to produce or deliver up any document (29) to any public servant (21), as such, *intentionally omits so to produce or deliver* up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both ; or if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Intentionally omits so to produce or deliver.—Under this and preceding sections, the Court will infer that the omission or absence of the accused was intentional, and it will be for him to show that it was not so. Causing the disappearance of an offence committed is dealt with in Section 201, P. C. Special and local laws requiring production of documents are not in any way provided for, or affected by the provisions of this Section 175, if the said laws contain penal provisions for non-compliance.

Illustration.

A, being legally bound to produce a document before a Zillah Court, intentionally omits to produce the same. A has committed the offence defined in this section.

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

* 176. Whoever, being legally bound (43) to give any notice, or to furnish information on *any subject* to any public servant (21), as such, *intentionally omits* to give such notice, or to furnish such information in the manner and at the time required by law, shall be

Omission to give notice or information to a public servant by a person legally bound to give notice or information.

punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; or if the notice or

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

information required to be given *respects the commission of an offence* (40), or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or local (42) law as therein defined, when the thing made punishable is punishable by such law with imprisonment for a term of six months or upwards, with or without fine.

Zemindars are not chargeable with the offences specified in Sections 176 and 202, P. C., in reference to provisions of Section 2, Regulation VIII of 1813, merely because they may have afforded no assistance whatever to the magistrate or police in the investigation of a case of murder, and not have given any clue to the discovery of the perpetrators, unless they are shown to have withheld information which they possessed (3 N. A., N. W. P., Part I, 1863, 65).

Any Subject.—There is somewhat of a similarity between this section and Section 202, I. P. C., in the next chapter. The main difference appears to be in that this section refers to information to be given on *any subject*, and Section 202, P. C., refers to offences against public justice more especially. The breadth of the provisions of this would, from the wording of this section, include an offence committed under Section 202 (see note under Section 202, P. C.).

Intentionally omits.—This section applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants, and the penalty which the law provides is intended to apply to parties who commit an intentional breach of such obligation (16 W. R., 35).

Respects the commission of an offence.—The refusal of a person to join in a dacoity does not imply a knowledge on his part of the commission of that offence, or render him liable to punishment under this section for intentional omission to give notice or information for the purpose of preventing the commission of an offence (6 W. R., 29).

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

*177. Whoever, *being legally bound* (43) to furnish in-

Furnishing false information on any subject to any public
vant (21), as such, furnishes, as true,
*information on the subject which he knows or has reason to
believe (26) to be false*, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; or if the information which he is legally bound to give respects the commission of an offence (40), or is required for the purpose of preventing the commission of an offence (40), or in order to the apprehension of an offender, with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or local (42) law as therein defined, when the thing made punishable is punishable by such law with imprisonment for a term of six months or upwards, with or without fine.

It is felony under Section 43, 6 and 7 Wm. IV., chap. 86, to cause the Registrar to make an entirely false entry of a birth, marriage, or death. (Reg. v. Mason.) Therefore, where a woman went to a Registrar of births and asked him to register the birth of a child, and she stated to him the particulars necessary for the entry; he made the entry accordingly; she signed it as the person giving the information,—*held* that this amounted to the felony of causing a false entry to be made within Section 43, and was not merely the misdemeanour of making a false statement under Section 41 of the above statute. (Reg. v. Dewitt. Roscoe, 428.)

Any officer authorised by the Local Government on this behalf may from time to time require any eunuch so registered to furnish information as to all property, whether movable or immovable, of or to which he is possessed, or entitled, or which is held in trust for him. Any such eunuch intentionally omitting to furnish such information, or furnish information as true on the subject which he knows or has reason to believe to be false, shall be deemed to have committed an offence under this and the preceding section, 176, I. P. C., as the case may be. (Section 30, Act XXVII of 1871.) Legal definition of eunuch for the purposes of Act XXVII of 1871 includes all persons of the male sex, who admit themselves, or on medical inspection clearly appear, to be impotent. (Section 24, Act XXVII of 1871.)

Being legally bound—This section does not apply to the case of any person who is examined by a Police Officer making a false statement, but to cases when by law landholders or village watchmen are bound to give information, and to other analogous cases of the same description (12 W. R., 23).

Information which he knows to be false.—See note under Section 120,

ante. Where a public servant is ignorant of his duties and makes a mis-statement through such ignorance or through dilatoriness, he would not come under this or the preceding section, but a public servant making a false statement, or omitting to give notice when called upon on a subject on which he is legally bound to furnish such information, is punishable under these sections, no interested motive being proved for his acting as he did notwithstanding.

Illustrations.

(a.) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the District that the death has occurred by accident, in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(b.) A, a village watchman, knowing that a considerable body of strangers had passed through his village in order to commit a dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound, under Clause 5, Section 7, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the Officer of the nearest Police Station, wilfully misinforms the Police Officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain place in a different direction. Here A is guilty of the offence defined in this section.

[*Ct. in which the offence is committed, subject to the provisions of Chapter xxxii. of this Code, or if not committed in a Court, the Mag. of the 1st or 2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

*178. Whoever *refuses to bind himself by an oath* (51) to state the truth, when required so to bind himself by a public servant (21) legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under section 222 C. C. P.)

Refusing oath when duly required to take oath by a public servant.

Refuses to bind himself by an oath.—*In re Reg. v. Vidil*, in 1861, in England, where a father was indicted for an assault on his son, and the son refused to give evidence against his parent, he was committed to prison summarily for one month. No relationship is a bar to evidence in a criminal case in the Mofussil. Some whose opinions are of weight think that Section 20, Act II of 1855, makes the relationship existing between husband and wife a bar to evidence in a criminal case; that it does so by implication, I presume. But the point has been settled by a decision of the Full Bench of the Calcutta High Court, where it was

held that, upon a trial in the Mofussil of a person charged with an offence, his wife was competent to give evidence for or against him; also upon a trial of several persons charged jointly with an offence, the wife of one of them was competent to give evidence for or against the others. "It is a general rule of English law," they said, "subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other." But the English law is not the law of the Mofussil. It is clear that the English criminal law was not the criminal law of the Mofussil, and that the English law of evidence was never extended by any regulation of Government to criminal trials there. Section 3 of Act XXV of 1852 did not render a husband or wife incompetent for or against the other in criminal cases. It merely declared that nothing in the Act should render them competent. (For a fuller report see F. L. E., 101-114.) But the doubt has been finally set at rest by Section 107 of the Evidence Bill, which lays it down that, "In criminal proceedings against husband or wife, the wives or husbands, respectively, shall be competent witnesses." And this provision was passed into law by the Evidence Act (Section 120), which received the assent of H. E. the Governor-General in Council on the 12th March, 1872.

[*Ct. in which the offence is committed, subject to the provisions of Chapter xxxii of this Code, or if not committed in a Court, the Mag. of the 1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*179. Whoever, being legally bound (43) to state the truth on any subject to any public servant (21), refuses to answer any question demanded of him touching that subject by such public servant, in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Refusing to answer a public servant authorized to question.

Under the C. C. P., if a Court before which the offence of the contempt under this section is committed, considers that a sentence of imprisonment is called for, it should record a statement of the facts constituting the contempt, and forward the case to a Magistrate (11 W. R., 49). Simple and not rigorous imprisonment can be inflicted in default of a fine imposed under this section.

[*Ct. in which the offence is committed, subject to the provisions of Chapter xxxii of this Code, or if not committed in a Court, the Mag. of the 1st or 2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

*180. Whoever *refuses to sign* any statement made by him, *when required* to sign that statement by a public servant (21) legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily under Section 222, C. C. P.*)

Refuses to sign when required to.—I have been unable to find any published Rulings under this section, but the offence herein described appears to be a statement made to a public servant of a nature that gives the public servant competence to legally require that it should be signed; refusal to his requisition brings the offender under the provisions of this section: *e.g.*, A, a witness to an enquiry under Section 131, Act XXV of 1861, concurs in the report made by the Police, but refuses to sign it when required to do so, he can be punished under the provisions of this section; or, when in order to the issuing of a summons or a warrant, A makes a complaint before a Magistrate authorized to receive such complaint, and the Magistrate examines A, and reduces his examination into writing, and calls upon A to sign, A being able to write, and A refuses to sign such statement, A can be punished under this section.

[*Ct. of S., or M. of 1st Class.*]

[*Uncog. Bailable.*
[*Warrant.*]

*181. Whoever, *being legally bound* (43) by an oath (51) to state the truth *on any subject* to any public servant (21) or other person authorized by law to administer such oath, makes to such public servant or other person as aforesaid, *touching that subject*, any statement which is false, and which he either knows or believes to be false, or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

For a definition of false statement see Section 191, P. C.

There is a similarity between this section and the latter part of Section 193, P. C. The main difference lies in that the statement given under

Section 193 is evidence in a judicial proceeding, though by its wording the latter part of that section includes the offence here described.

Being legally bound.—A person is not legally bound to state the truth, where the officer who administers the oath is trying a case wholly beyond his jurisdiction (2 Madras H. Ct. R., 438).

On any subject.—This section refers to matters which do not come under the definition of judicial proceedings, although the wording of the section is apparently large enough to admit false statements of every description; its action is restricted as regards those made under certain circumstances by Section 193, P. C. (7 W. R. C. R., 104).

Touching that subject.—The false statement must be concerning or “touching the subject” on which the oath is permitted to be administered.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*182. Whoever gives to any public servant (21) any information which he knows or believes to be false, *intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant to use the lawful power of such public servant to the injury (44) or annoyance of any person*, or to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Intending . . . such public person to use the lawful power, &c., to the injury, &c.—The gist of this offence consists in the offender's *intention* in giving the false information. The offence is the *contempt of the lawful authority* of the public servant, by moving him to use his authority wrongfully. It is against the public servant that it is committed, and it is complete directly the false information is given, irrespectively of the results which may actually follow the action that may be taken upon it. The specific injury that may result to the person in respect of whom the information is given is a distinct matter—and so *in re* R. v. Haree Ram, *Held*, that no ground for a complaint of giving false information to a public servant under this section exists on the part of any one but the public servant against whom the offence was committed (3 H. C. R. N. W. P., 194).

This Section 182 applies to false statements, which would, if true, be such as to call into exercise the legal powers of the public servant to the damage of the person against whom the statement is directed.

This Section 182 does not apply to the case of a person laying a false charge before a Police Officer; such an offence falls under Section 211 (8 W. R. C. R., 67). *Vide* note under Section 211, *post*.

Where A out of malice to B gives to C, a public servant, false information intended to injure B, B cannot prosecute A criminally without C's consent (5 R. C. C. R., 37).

Illustrations.

(a.) A informs a Magistrate that Z, a Police Officer subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(b.) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

[M. of 1st or 2nd
Class.]

[Unrecog. Bailable.]
[Summons.]

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant (21), knowing or having reason to believe (26) that he is such public servant, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Resistance to the taking of property by the lawful authority of a public servant.

Vide Sections 97 and 99 with reference to the right of private defence of property; also the right where the act is done by a public servant.

If a bailiff break the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser, if it turn out that the person or goods of the debtor are not in the house; and under such circumstances the owner of the house does not by obstructing the bailiff render himself punishable under this Section 183 or Section 186, *post*. The English law on the subject of the right of the sheriff to break doors is laid down in *Semayne's* case (1 Smith's L. Ca., 4th ed., 73), and the points resolved in that case are quoted in 7 Bo. H. C. R., 84; five in number. As regards the first four of these points, the law laid down in

them is in accordance with the law in India. The provisions of the first are analogous to the provisions of the Indian Penal Code regarding the right of private defence. The second may be compared with Section 223 of the Civil Procedure Code. The third point corresponds with Sections 94 and 123 of Act XXV, 1861. The fourth point has been decided by the Calcutta High Court (*in re R. v. J. MacQueen*, 3 R. C. C. R., 8), viz., that a sheriff had no right to break open a defendant's house to execute any process at the suit of any subject. The fifth point, viz., the right of a bailiff to break open the house of a third person in order to attach goods belonging to a judgment-debtor, came before Bo. H. C. in the present case. The point was not argued, and the decision of this question was not necessary for the disposal of the case. The Court said that "although it was laid down in *Semayne's* case that the sheriff may justify (after request made) the breaking open the doors of a third person's house, still he does so at his peril; for if it turn out that defendant was not in the house or had no property there, he is a trespasser (*Johnson v. Leigh*, 1 Marsh, 565; *Ratcliffe v. Burton*, 3 B. & P., 229); and this doctrine has been carried further, for it has been thought that the sheriff cannot, even though he may have grounds for suspicion, justify entering the dwelling-house of a third person, although he break no door, unless it prove in the event that the defendant or his goods were actually therein (*Cooke v. Birt*, 5 Taunt. 769; 7 Bo., 130; H. C. R., 83).

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Summons.*]

*184. Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant (21), as such, shall be punished with imprisonment of either description (53) for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily under Section 222, C. C. P.*)

Obstructing sale of
property offered for
sale by authority of a
public servant.

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Summons.*]

*185. *Whoever, at any sale of property held by the lawful authority of a public servant (21), as such, purchases or bids for any property on account of any person (11), whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description*

Illegal purchase or
bid for property offered
for sale by authority of
a public servant.

(53) for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Whoever at any sale.—The sale referred to in this section applies to *any* sale, and is not restricted to sales of corporeal property (5 R. J. P. J., 38).

Purchases or bids.—See Section 169 as to punishment for public servants purchasing or bidding unlawfully for property, and note under Section 169, P. C.

Not intending to perform the obligations.—A person is guilty of contempt under this section by bidding for the lease of a ferry sold at a public auction by the Magistrate, and failing to complete the sale (5 R. J. P. J., 38).

In a case of a conviction under Section 185, P. C., on a charge made by a Magistrate and Collector without signing his order as Collector—*Held*, that such omission was not in itself sufficient to vitiate proceedings.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*186. Whoever voluntarily (39) obstructs any public servant (21) in the discharge of his public functions shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

A person who took a receipt from an Income Tax Mohurrir without paying the tax, was not punishable under this section for obstructing the Mohurrir in the discharge of his public duties (3 N. A., N. W. P., Part I. of 1863, p. 63).

Conviction and sentence under this section reversed, as the conduct of the accused refusing to accompany a measuring Clerk employed under Act I of 1865 (Bombay) to his (accused's) house and permit it to be measured, did not constitute the offence of obstructing a public servant in discharging his public functions.

Quere, whether Section 11 of Act I of 1865 (Bombay) justifies Surveyors in entering private houses for the purpose of measuring them (5 Bo. H. C. R., 51).

A Civil Court must itself, under Section 25, Regulation IV, 1793, punish a simple resistance of its process, and not make the case over to the Magistrate. So long as Section 25, Regulation IV, 1793, is in force,

the Civil Court should exercise the jurisdiction vested in it by law (H. Ct., Calcutta, 22nd April, 1868, 5 R. C. C. R., 63).

The above provision applies only to the Courts of Zillah judges, not to subordinate Civil Courts. It is more than doubtful whether the provisions of Section 25, Reg. IV, 1793, are not superseded by Section 2, Indian Penal Code (2 B. L. R. F. B. R., 23). The Full Bench of the Calcutta High Court have *held* that the resistance of the process of a Civil Court is punishable under the C. C. P. by Courts of criminal jurisdiction, and that such an offence was punishable under this Section 186 (2 B. L. R. F. B. R., 21). The refusal of a cart-owner to give his cart on hire to a Government officer does not constitute the offence of obstructing a public servant in the discharge of his public functions within the meaning of this section (9 Bo. H. C. R., 165).

A got a decree against B in the Lower Court for rupees 24 and executed it. The Lower Court's order was appealed against, and the order of the Appellate Court was to stay execution of decree until case was settled in the Settlement Court. On perusal of Appellate Court's decision, the Lower Court called on A to refund the money, and on A's non-compliance, A was brought before Magistrate under this section, and punished. This was undoubtedly wrong, for there is no law under which Lower Court had authority to demand restoration of money realized in execution of a decree. The remedy might be had by application to Court of appeal, which could review its order, on the representation of the appellant, that the former order to stay execution is of no effect, because the Appellate Court did not know that execution had already taken place.

Escaping from lawful custody is not obstructing a public servant in the discharge of his public functions within the meaning of this section (2 Bo. Rep., 134).

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*187. Whoever, being bound by law (43) to render or furnish assistance to any public servant (21) in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

the purposes of executing any process lawfully issued by a Court of Justice (20), or of preventing the commission of

an offence (40), or of suppressing a riot (146) or affray (159), or of apprehending a person charged with, or guilty of, an offence (40), or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or local (42) law, as therein defined.

Vide note on Section 176.

By English law it is the duty of a private person, in whose presence a felony is committed, to do his utmost to arrest the felon, and in default he is punishable with fine and imprisonment (1 Hale, 588).

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

*188. Whoever, knowing that, *by an order promulgated by a public servant (21) lawfully empowered* to promulgate such order, he is directed to abstain from a certain act, or *to take certain order with certain property in his possession* or under his management, *disobeys such direction*, shall, if such disobedience *causes or tends to cause*, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, be punished with *simple imprisonment* for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

causes, or tends to cause, danger to human life, *health, or safety*, or causes, or tends to cause, a riot (146) or affray (159), shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he

knows of the order which he disobeys, and that his disobedience produces, or is likely to produce harm. (*Triable summarily* under Section 222, C. C. P.)

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

By an order promulgated.—A decree promulgated by a Civil or Revenue Court is not an order within the meaning of this Section 188, P. C. (Circular No. 52 of 1866, J. C., O.).

By a public servant lawfully empowered.—Before conviction can be had under this section, it must be shown and proved that the accused knew that an order had been promulgated by a public servant, directing such accused person to abstain from a certain act (12 W. R., 49). Oomra was convicted of stealing a heifer. Moola bought the stolen heifer from accused, and was ordered by the Deputy Commissioners to give notice of the purchase at the Thanah. This Moola omitted to do. He was tried and convicted under this section. *Held*, conviction wrong, as the order in question was not one which the Deputy Commissioner was lawfully empowered to promulgate within the meaning of this section.

A sentence of fine for disobedience to an order is only lawful under Section 188, P. C., when order is passed by a public servant lawfully empowered to promulgate such order.

Take certain order with certain property in his possession, &c.—If a person in possession of, or having control over, a well or tank, will not obey the order passed under this section, or show cause, or petition for a jury against the same, he is liable, under Section 311 of Act XXV of 1861, to penalty prescribed on that behalf in Section 188, P. C., and Magistrate may proceed to carry out the order at his expense (Circular No. 24 of 1865, J. C., O.).

Disobeys such direction.—This section should be read with Section 62, Act XXV of 1861; the former provides a penalty for the infraction of orders promulgated by a Magistrate under the latter section.

Causes, or tends to cause annoyance.—A Magistrate cannot forbid in general terms two parties to use any musical instrument in the neighbourhood of each other's houses, but he may forbid them doing so for the purpose of mutual annoyance (6 W. R. C. R., 40).

Simple imprisonment.—The wording of this section, as to the description of punishment to be awarded to each class of offences, is so clear that one would have supposed that no Magistrate could go wrong; nevertheless, the High Court, Bombay, have had to decide that rigorous imprisonment

can only be awarded in cases coming within the terms of the latter part (3 H. Ct. Bo., 33).

Health or safety.—Neither can a Magistrate order that the banks of a tank in the dry bed of a river be destroyed on the ground that stopping the river interfered with the public health (10 W. R. C. R., 36). In this case the tank in question had existed for some five or six years.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

*189. Whoever holds out any threat of injury (44) to any public servant (21), or to any person (11) in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act (33), or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

A person against whom information has been falsely given with a view to his injury, has a right to bring a civil action for damages with or without the consent of the public servant against whom the offence was committed, but he cannot bring a criminal charge under this section or any other section of Chapter X, P. C., without the permission of such public servant, the law looking upon the conduct of the person who gives the false information as an offence not against the individual charged, but against the public servant to whom the false information was given (9 W. R., 31).

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

*190. Whoever holds out any threat of injury (44) to any person (11) for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant (21) legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt. They are perjured, who preserving the words of an oath, deceive the ears of those who receive it.

“Who keep the word of promise to the ear,
And break it to the hope.”

Cicero's estimation of the Greeks applies equally to many who frequent our Courts here in India. “The sacred obligation that lies upon a witness to speak the truth is what these people have never regarded.” That the old Greek proverb of “Lend me your evidence,” implying, and “you shall have mine when you want it,” is pretty commonly acted on, is shown in the following lines from a local organ. These lines unfortunately contain, in a somewhat off-hand style, a large amount of truth.

“Is he taken red-hand at his head-breaking sport?
He has clansmen a score who'll attend him in Court,
And swear he lay sleeping, the hour of the fray,
At his wife's cousin's grandmother's—ten leagues away.
They mock at your oaths, so outlandish and queer,
And lie without wincing for Alen Aheer.
(They require no Pythoness to tell them :)
'O Glaucus, gold is good to win,
And a false oath is easy sin ;
Swear an thou wilt : death follows both
The righteous and unrighteous oath.'
(But they care little and believe less in the warning :)
'But Perjury breeds an awful birth,
That hath no name in heaven or earth ;
Strong without hands, swift without feet,
It tracks the pathway of deceit,
Sweeps its whole household from the land ;
Only the just man's house shall stand.' ”

Probably most of the illiterate witnesses who throng our Courts, if they give the matter a thought, think that in the first place there is very little chance of their being detected, even should a zealous but overworked official move in the matter against them ; and in the next place they doubt whether the crime they are contemplating is one that their gods would punish ; and lastly, they by this time know how different are the opinions of different Courts on the subject of what constitutes perjury,

that Juvenal's description of the course of thought of a man so situated exactly meets their case :—

“ But grant the wrath of Heaven be great ; 'tis slow,
And lets full many a year precede the blow.
If then to punish all the Gods [and he might add all
the Courts] agree,
When, in their vengeance, will they come to me ?
But I perhaps their anger may appease,
For they are wont to pardon faults like these.
At worst there's hope for every age and clime
In different shades between the self-same crime.”

The fear of punishment under the provisions of this chapter has no influence whatever on a witness. The probability of his being found out is small, and if found out, of being prosecuted is still less ; and if prosecuted, the chance of his getting off is at least 50 per cent. As has been only too truly remarked, “ The only constant guide to the tongue of a native is his interest. Other tests of the credibility of testimony may fail, this never. Failing as he does to recognize the obligation imposed to speak the truth by our solemn affirmations, and conscious that, whatever course he may adopt, he will not lose the respect of his fellows, and careless from experience of the chances of legal punishment, the mind of the ordinary witness is almost in equilibrio, till the weight of his interest thrown into either scale decides the question.”

Perjury is defined by Sir Edward Coke to be “a crime committed when a *lawful* oath is administered, in some judicial proceeding, to a person who swears *wilfully, absolutely, and falsely* in a matter *material* to the issue or point in question.” “ The perjury must be corrupt (that is, committed *malo animo*), wilful, positive, and absolute ; not upon surprise or the like ; it also must be in some point material to the question in dispute ; for if it only be some trifling collateral circumstance, to which no regard is paid, it is not penal ” (4 Black. Com., 142).

But the words of Section 191, Penal Code, are very general, and do not contain any limitation that the false statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within this section, if the false evidence is intentionally given ; that is to say, if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court, and of leading it to be supposed that that which he states is true (16 W. R., 37).

“ Many offences which interfere with the administration of justice are sufficiently provided for in other chapters, particularly in the chapter relating to contempts of the lawful authority of public servants. The rules touching the offence of attempting to impose on a Court of Justice by false evidence differ from those of the English law. It appears in the first place that the offence designated as the ‘fabricating of false evidence’ is not punished with adequate severity under the systems referred to by Law Commissioners. This may perhaps be, because the offence, in its aggravated forms, is not one of very frequent occurrence in Western

countries. It is notorious, however, that in this country the practice is exceedingly common, and for obvious reasons In countries in which the standard of morality is high, direct evidence is generally considered as best evidence But in India the case is different In England, a person who wishes to impose on a Court of Justice knows he is likely to succeed best by perjury, or subornation of perjury. But in India, where a Judge is generally on his guard against direct false evidence, a more artful mode of imposition is frequently employed. A lie is often conveyed to a Court, not by means of witnesses, but by means of circumstances, precisely because circumstances are less likely to lie than witnesses. These two modes of imposing on the tribunals appear equally wicked and equally mischievous. It will indeed be harder to bring home to an offender the fabricating of false evidence. But wherever the former offence is brought home, we would punish it as severely as the latter" (L. C. R.). By Section 24, Act VIII, 1859, false statements made in declarations mentioned in Sections 27, 118, and 164, Act VIII, 1859, are punishable under the provisions of this chapter. It should be borne in mind that in commitments for giving false evidence, under provisions of the sections of this chapter, the committing officer should invariably insert on the charge the *particular statement* on which perjury is assigned.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment; but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *transportation*, or *penal servitude* or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

191. Whoever, being legally bound (43) by an oath
Giving false evi- (51), or by any express provision of law,
dence. to state the truth, or being bound by law
to make a declaration upon any subject, makes any state-
ment which is false, and which he either knows or believes
to be false, or does not believe to be true, is said to give
false evidence.

Explanation 1.—A statement is within the meaning of this section, whether it is made verbally or otherwise.

To support an indictment for perjury under the English law, the prosecutor must prove (1) the authority to administer an oath; (2) the occasion of administering it; (3) the taking of the oath; (4) the substance of the oath; (5) the materiality of the matter sworn; (6) the introductory averments; (7) the falsity of the matter sworn; (8) the

corrupt intention of the defendant (2 Stark. Ev., 621). For further information on this head see Roscoe, pp. 747 to 773.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations.

(a.) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on trial that he heard Z admit the justice of B's claim. A has given false evidence.

(b.) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(c.) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z, A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(d.) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence, whether Z was at that place on the day named, or not.

(e.) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly, that which is not, and which he does not believe to be a true interpretation or translation. A has given false evidence.

192. Whoever causes any circumstance to exist, or
Fabricating false evidence. makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding (193), or in a proceeding taken by law before a public servant (21), as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence,

to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

The wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision. In *R. v. Castro, alias Orton*, when Dr. Kenealy was arguing for his client, that, if his answers were given with no other motive than to evade the difficulties of examination punishable by law, the Lord Chief Justice emphatically declared, with the concurrence of the whole Court, "that any answers upon oath wilfully—that is knowingly—false and made for any indirect purpose, as to avoid a difficulty which might arise from giving a true or a direct answer, was undoubtedly perjury" (*Times Report of the Tichborne Case*, 6 August, 1873).

The rule *omnia præsumuntur contra spoliatores*, that all things are to be presumed in disfavour of the spoliator, is rather a favourite maxim in the law, and rests partly on natural equity, partly on convenience. (See *Armory v. Delamerie*, 2 Smith's Leading Cases, 153.) In criminal cases, where life or liberty is at stake, great care must be taken not to attribute to spoliation or similar acts any force to which they are not entitled. *Nations and ages* differ in the tone of moral feeling diffused through society and reverence for the sacredness of an oath, and the other sanctions of truth. *Men* differ in strength of conscientious principle as well as in courage, and *tribunals* differ in ability and impartiality; and in the quantity of evidence exacted for conviction, undoubtedly the fabrication or suppression of evidence by a party accused of a crime is always a circumstance, frequently a most powerful one, to prove his guilt; but many instances have occurred of innocent persons, alarmed at a body of evidence against them which, although inconclusive, they know they are unable to refute, having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory testimony (Best P. L. and F., 209).

Attempt to fabricate false evidence before the Police, how punishable. The maximum punishment for the offence is given under the provisions of Section 511, *post*. But the term of imprisonment cannot be extended beyond one half of the longest term provided for the substantive offence.

Illustrations.

(a.) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(b.) A makes a false entry in his shop book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(c.) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to

be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. A has fabricated false evidence.

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Available.
[Warrant.]*]

*193. Whoever intentionally gives false evidence (191) in any stage of a *judicial proceeding*, or fabricates false evidence (192) for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine (or *with whipping in addition to, if previously convicted of this offence*, VI, 4).

Illustration.

A, in an inquiry before a Police Officer vested with the power of holding preliminary inquiries into cases involving an infraction of salt law, deposes that certain parties had concealed in their houses illicit salt, which would be found if a search were made. A is found to have concealed about his body two earthen vessels containing illicit salt. A, who is an informer, intends placing the illicit salt in the house of parties charged, to serve as evidence against them. The prisoner A is guilty of attempting "to fabricate" false evidence in a stage of judicial proceeding. Maximum punishment under Section 193 is seven years. An attempt of ditto under Section 511, term of imprisonment cannot extend beyond one half of longest term (seven years) provided for substantive offence. A is therefore liable to three and a half years, either description.

Explanation 1.—A trial before a Court-Martial or before a Military Court of Request is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice (20), is a stage of a judicial proceeding (193), though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement

which he knows to be false. As this inquiry is a stage of judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of judicial proceeding, A has given false evidence.

There is a similarity between the offence contained in this section and that contained in Section 181 *ante*. Chapter X relates to "contempts of the lawful authority of public servants," Chapter XI to "offences against Public Justice." There is this difference in these two sections: this Section 193 provides punishments in its first clause for false evidence in a judicial proceeding, whereas 181 *ante* refers to matters which do not come under a judicial proceeding; *e.g.* the Inspector-General of Police is authorized by Section 5, Act V of 1861, throughout certain districts to administer oaths. A person on an oath legally administered by such special law making a false statement, would be punishable under Section 181, P. C., *ante*. Oaths are also authorized to be administered by certain officers in pension cases, &c. Although the wording of Section 181 *ante* is apparently large enough to admit false statements of every description, its action appears to be restricted as regards those made under such circumstances as are provided for by this Section 193. The latter part of this Section 193 includes the offence mentioned in Section 181 *ante*, probably for the sake of symmetry.

To constitute the offence of giving false evidence under this section, it is not necessary that the false evidence given should be material to the case in which it is given. *Aliter* under Section 192 (5 Bo. H. C. R., 68).

Held that the mere failure to an averment in a civil suit does not constitute perjury, and to prove that offence, the falsity of the averment must be clearly substantiated (1, part I, 1).

Requisite proof.—Upon a prosecution for giving false evidence, the law does not require proof of a corrupt intention. It is sufficient that there is proof of intention, and if the statement was false, it may be presumed that, making it, the accused *intentionally* gave false evidence (3 H. C., N. W. P. R., 133). It was held *in re R. v. Daya'ji Endayi*, that when an offence under this section is established, a conviction under Section 181 *ante*, when the accused made on solemn affirmation a statement before an Income-Tax Commissioner, which statement the accused knew or had reason to believe to be incorrect: *held* that such statement amounted to an offence under this section (8 Bo. H. C. R., 21).

A sub-Magistrate conducted an inquiry in a case of murder and riot without having received the necessary authority under the C. C. P. *Held* that an untrue statement made by a witness in the course of such inquiry was not false evidence under this section, as the sub-Magistrate was acting without jurisdiction (5 P. Po., 38).

If the defendant has always adhered to one statement, some one or more of the charges of false evidence must be proved by two witnesses : one witness alone is not sufficient, because in that case there is only oath against oath ; and the presumption of law being in favour of the innocence of the prisoner he must be acquitted (Reg. v. Muscot, 10 Mod., 193). But if the charge of giving false evidence be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would be sufficient it seems (R. v. Lee, 2 Russ., 650 ; R. v. Boulter, 2 Den., C. C., 396). And although every charge of giving false evidence must be proved by two witnesses, it is not necessary that every fact which goes to make up and support the charge should be proved (Reg. v. Gardner, 8 C. and P., 737 ; Reg. v. Roberts, 2 C. and K., 607). Also if the false evidence consist in the defendant having sworn contrary to what he had before sworn on the same subject, this is not within the rule before mentioned, for the effect of the defendant's oath in the one case is neutralized by his oath in the other, and proof by one witness will therefore make the evidence against the defendant preponderate (R. v. Knile, 2 B. and Ald, 292, N.). But in England the mere contradiction of one oath of the defendant by the other is not enough (R. v. Harris, 5 B. and Ald, 296 ; Reg. v. Wheatland, 8 C. and P., 238). 6 M. J. 2, 42. *Vide* note under Section 72 *ante* with reference to the question of an alternative finding under this Section 193, and compare the views held *in re* Reg. v. Bedoo Noshyo, 11 W. R., 37 ; Reg. v. Kala Khan, 12 W. R., 23 ; *in re* Palasey Chutty, 4 M. H. C. R., 51 ; also *in re* Reg. v. Murst Zumeerin, 6 W. R., 65 ; also *in re* Noor Khan Mojum Khan, 1st April, 1863, West's Acts and Regulations Bo. ; also *in re* Reg. v. Ganogi bin Pandji, 5 Bo. H. C. R. Cr. C., 49, and Reg. v. Normal, 12 W. R., 69. See also Reg. v. Soondor Mohoone, 9 W. R., 25 ; Reg. v. Kalichurn Lahoree (2nd, 54).

In re Reg. v. Ahmed Ally, 11 W. R., 27, Norman, J. said : " It appears to us that the rule is that no man can be convicted of giving false evidence *except upon proof of facts which, if accepted as true, show not merely that it is incredible, but that it is impossible that the statement of the party accused made upon oath can be true.* If the inference from the facts proved falls short of this, it seems to us there is nothing on which a conviction can stand, because, assuming all that is proved to be true, it is still *possible* that no crime was committed." Thus far as to the truth or falsehood as to the actual state of facts ; beyond this the Penal Code requires the prosecution to prove that the accused knew, or believed, that the statement he made was false at the time of making it, or that he did not believe it to be true. In this last requirement the Penal Code goes beyond the English law, inasmuch as it imposes upon a witness the necessity of forming a definite belief as to the truth of his evidence before he gives it, and prevents him from sheltering himself under the

plea of carelessness or inadvertence. A man, before he gets into the witness-box, must *believe* that all the evidence he is going to give is true, otherwise he gives false evidence. That this is an extension of the English law will be seen from the statement in Archbold as to what is perjury under that law. "The matter sworn must be either false in fact; or, if true, the defendant must have known it to be so (1 Hawk, c. 69, s. 6; Just, 166; Palmer, 294); e. g. if a man swear that J. N. revoked his will in his presence—if he really had revoked it—but it were unknown to the witness that he had done so, it is perjury (Hetly, 97)." The state of the prisoner's mind at the time he gave the alleged false evidence of course cannot be proved directly; but surrounding circumstances will ordinarily furnish sufficient facts from which it can be inferred that he knew or believed his evidence to be false, or did not believe it to be true.

A Judicial Proceeding.—It is not a judicial proceeding when a Magistrate, on receipt of an anonymous letter, takes steps to trace the writer, and evidence given in such proceedings by a witness, if subsequently proved to be false, cannot be punished under Section 193, P. C. (1 R. C. C. R., 71).

It is essential in order to sustain a charge under this section that it should be proved that there was a judicial proceeding and that the false statement alleged to have been made in the course of the proceeding was made. A charge under this section should specify not only the judicial proceeding in the course of which the prisoner is accused of having made the false statement, but the particular stage of the proceedings in which the statement is made (1 B. L. R., part V., 13).

Falsely deposing in the name of another person is giving false evidence, not cheating by personation (1 Bo. H. Ct. R., 89). A suppression of evidence is giving false evidence. A prisoner asked a witness to suppress certain facts in giving his evidence against him before a Magistrate on a charge of defamation. It was held that this amounted to an abetment of the offence of giving false evidence in a stage of a judicial proceeding, and was liable by Court of Sessions only (2 Madras H. Ct. R., 438).

Alternative Finding.—See judgment of Madras High Court *in re* Palany Chetty, appellant, at pages 320-1, *Madras Jurist*, dated August 1st, 1868. The satisfactory proof of contradictory statements on oath or solemn affirmation is sufficient to justify an alternative finding.

An alternative finding cannot be based in a case of giving false evidence upon two statements which are not absolutely contradictory the one of the other, nor when in one of them the accused gives only hearsay evidence; every presumption in favour of the possible reconciliation of the statements must be made (12 W. R., 11).

In this case which was before a full bench of five Judges, two doubted whether the judgment was right, and the other three made no reference to Section 72 *ante*. In *Reg. v. Soonder Mohuee*, 9 W. R., 25, and *Reg. v. Kalichurn Lahore*, *id.* 54, it was *held* that the mere fact that a person has made a statement which contradicts a previous statement, is not itself sufficient to bring him within Section 193: and *in re* Noor Khan Moujum

Khan (West's Acts and Regulations), it was *held* that "two contradictory statements will not support a conviction of perjury, and in *Reg. v. Ganoji vin Pandji*, 5 Bo. H. C. R., 49, it was *held* that "where a person makes two contradictory statements in the course of a judicial proceeding, he may be tried and convicted of giving false evidence on a simple charge, if there be evidence to show which statement is false; and *in re Reg. v. Nomal*, 12 W. R., 69, Norman, J. said, "It is one thing to show that a particular statement made by a witness is inaccurate, or even false, and another to say that the witness has intentionally given false evidence To overlook the difference between the making of contradictory statements by a witness under examination, and the giving of intentional false evidence, is to shut one's eyes to the infirmities of human memory, to fail to understand how slow are the intellects and how imperfect the powers of expression of uneducated peasants I firmly believe that if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes subjected to cross-examination by an adroit and, perhaps, not over scrupulous advocate, would be safe."

Contradictory Statements.—Where a person is charged with making two contradictory statements, it must be proved by direct evidence that both statements were made, and there must be an inquiry as to which statement is untrue, and whether the accused wilfully made the statement which is supposed to be false, knowing it to be false (12 W. R., 31).

Where a prisoner is charged separately for having given false evidence with regard to two statements directly opposed to each other, a plea of guilty on one of the charges does not involve an acquittal on the other. A Sessions Court is bound to take evidence and try a charge before it can acquit a prisoner of that charge. An accused cannot elect as to the charge on which he will be tried (see H. C. C. Letter of 19th June, 1867; 8 B. L. R., App. 25).

A swears before a Magistrate that he saw prisoner kill B. On a trial, A swears that he did not see prisoner kill B, and prisoner is acquitted. A thereupon is committed for giving false evidence, and two heads of charge in the alternative form are drawn up. *Held*, that although, of the two statements, the one on which the perjury rests cannot be particularized, a finding that A has intentionally given false evidence, and that he is guilty either of the offence specified in the first, or of the offence specified in the second head of the charge, is legally admissible (J. Campbell dissenting) (2 R. C. C. R., 49).

Requisite sanction.—The sanction accorded by a Civil Court under Section 169 of Act XXV of 1861, in a case under this section, need not be more specified than a general sanction to prosecute for any false statement contained in the two depositions given (11 W. R. Cr. R., 17).

A was sued as the maker of certain promissory notes. In his written statement, duly verified, he denied making notes, and pleaded payment of alleged consideration by cash payments. B offered to withdraw his

suit if A swore that he had made the alleged payments. On A's so swearing, the suit was dismissed in pursuance of the agreement made by B. B then applied for sanction to prosecute A for the false verification of his written statement. Sanction was given, and the H. C. N. W. P. in this case *held* that a Court cannot take cognizance of a bargain to abstain from the prosecution of a person who has committed such an offence as that of wilfully given false evidence (3 H. C. R. N. W. P., 166).

A Civil Court sanctioning a criminal prosecution for giving false evidence, must distinctly state the exact words upon which the prosecution is based, and must not sanction such proceedings generally.

A general sanction by a Judge to a prosecution for giving false evidence under Section 193, P. C., and for false verification, is not sufficient. The *exact words* upon which the prosecution is based, and the exact offences which the Magistrate is to investigate, should be pointed out. The verification of an application filed in the Civil Court, in which it was stated that the applicant did not sign an alleged deed of compromise, does not subject him to punishment for giving false evidence. Such an application falls, not under Section 120, Act VIII of 1859, but under Section 209, Act VIII of 1859, and need not, therefore, be verified. Documents tendered in a civil suit, if relied on in a prosecution for giving false evidence, must be proved in the Criminal Court before they can be received as evidence (9 Cr. R., Weekly R., 58).

In commitments for giving false evidence under Sections 193-4-5, the committing officer should invariably insert on the charge the particular statement on which perjury is assigned (H. Ct., Calcutta, Circular No. 3 of 1866. Circulars Nos. 5 and 24 of 1866, Judicial Commissioner, Oudh).

Each act of giving false evidence by different persons, although in the course of the same judicial proceeding, is a separate offence, and a separate charge must necessarily be framed against each prisoner, and a separate trial must be held of each charge (Madras H. Ct., March, 1867).

Charge what to contain.—In all cases for giving false evidence, the charge should show on the face of it the particular matter in respect of which the charge is made (see Circular Order No. 3, 1866, 5 W. R., 2, Criminal Circular; also notes on Section 193, P. C.). There may be an alternative conviction in a case in which the evidence proves the commission of one of two offences falling within the same section of the P. C., and it is doubtful which of such offences has been proved. But it must be borne in mind that a man cannot be put on his trial on a charge containing only one head, but framed in the alternative. (For examples, see 5 R. C. C. R., No. 7, 34.)

Offences simultaneously committed.—A prisoner ought not to be convicted and sentenced both under Section 211 and 193, Penal Code, when these offences are committed simultaneously and by the same act (5 R. J. P. J., par. 7, No. 927, 138).

Or Fabricates.—The term "fabrication," in Section 193, refers to the fabrication of false documentary evidence to be used in a suit, so that to

convict under this section, it is essential to aver and to prove that the fabricated documents were intended for that purpose. The illegal concealment by act or omission, contemplated by Section 120, has reference to the existence of a design on the part of third persons to fabricate evidence (I. J., 104).

Competent witness.—*In re Queen v. Mukta Singh*, the prisoner gave evidence on the trial of one Gourkishor. Cockburn, J., having discovered this evidence to be false, made a complaint against the prisoner before the Magistrate, and was examined as a witness. The Magistrate committed the prisoner for trial under this Section 193, P. C. The case came on for trial before (S. J.) Cockburn. On the trial in the Session Court Mr. Cockburn was himself sworn, and gave evidence as a witness, and put in and proved the evidence taken before him. *Held* that he was a competent witness, and can give evidence in a case being tried before himself, even though he laid the complaint acting as a public officer: provided he has no personal or pecuniary interest in the subject of the charge; and he is not precluded thereby from dealing judicially with the evidence, of which his own forms a part (4 B. L. R., 15).

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

194. Whoever gives (191) or fabricates false evidence (192), intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence (40) which is capital

Giving or fabricating false evidence with intent to procure conviction of a capital offence.

(1) Murder. (2) Abetment of suicide of a child under 18 years,—persons of unsound mind, one who is intoxicated. (3) Being member of a gang of dacoits by whom murder is committed. (4) Waging war against Queen. (5) Abetting mutiny. (6) Giving or fabricating false evidence with intent to procure conviction of a capital offence.

by this Code or the law of England, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to a fine; and if an innocent person be convicted

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described (35) (*or with whipping in addition to, if previously convicted of this offence, VI, 4*).

This section was amended by Section 7 Act XXVII of 1870; the words "or the law of England" were added after the words "by this Code."

No such provision as that contained in this section exists at home in England.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined. This provision was first inserted by Act IV of 1867, and subsequently by Section 2, Act XXVII of 1870.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

* 195. Whoever gives (191) or fabricates false evidence (192), intending thereby to cause, or knowing it to be likely that he will thereby cause, any person convicted of an offence (40) which by this Code or the law of England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished (or *with whipping if previously convicted of same offence*, VI, 4.)

This section was amended by Section 7 Act XXVII of 1870; the words "or the law of England" were added after the words "by this Code."

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined. This provision was first inserted by Act IV of 1867, and subsequently incorporated into Section 40 *ante*, by Section 2 of Act XXVII of 1870.

Illustrations.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life or rigorous imprisonment for a term which may extend to ten years, with or without fine. A therefore is liable to such transportation or imprisonment, with or without fine.

Where a man burns his own house, and charges another with the offence of doing so, he should be convicted and sentenced under Section 211, and not under this Section 195, P. C. (8 W. R., 5).

[*Ct. of S. or M. of*
1st Class.]

[*Uncog. According*
as offence of giving
such evidence is bail-
able or not.
[*Warrant.*]

* 196. Whoever *corruptly uses or attempts to use* as true

Using evidence known or genuine evidence any evidence which to be false. he knows to be false (191) or fabricated (192), shall be punished in the same manner as if he gave or fabricated false evidence.

Corruptly.—This section makes punishable a party using or attempting to use evidence which he has suborned and knows to be false. Morgan and Macpherson in their notes on the Penal Code say that the word “corruptly” “is probably used here to denote that those whose duty it is not to judge of credibility of evidence, but to submit it for the consideration of judicial and other functionaries on behalf of their clients, do not incur the penalties of using false evidence.”

Whoever uses or attempts to use.—The provision of this section is not ordinarily intended to apply to subornation of perjury. To establish an offence under this section, it must be shown that the accused made some use of the false evidence after it was in existence (1 Ind. Jurist, 122).

A person who uses in Court false documents as true, besides swearing to their authenticity, may be convicted under this section only, and not under 471 also (3 W. R., 17).

[Ct. of S. or M. of
1st Class.]

[Uncog. Bailable.]
[Warrant.]

* 197. Whoever *issues* or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence (191).

Issues.—Wharton in his Law Lexicon gives one of the definitions of “issue,” as “sending forth,” so that under this section, any one sending forth or issuing a false certificate of the kind herein described, is equally guilty as the person signing it. The previous and preceding sections deal with “using,” which is or may be quite separate from “issuing,” and of which the “issuing” may be the first act in a series of offences.

[Ct. of S. or M. of
1st Class.]

[Uncog. Bailable.]
[Warrant.]

* 198. Whoever corruptly uses or attempts to use any such certificate, as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence (191).

Using as a true certificate one known to be false in a material point.

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

* 199. Whoever, in any *declaration* made or subscribed by him, which declaration any Court of Justice (20), or any public servant (21) or other person (11) is bound or *authorized by law to receive* as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence (191).

Declaration.—Declarations of the nature of certificates are intended, such, for instance, as are mentioned by Blackstone under the head of trial by certificate “allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute;” such, again, as the certificate of a former conviction of felony, by the Clerk of the Court where the offender was convicted, which is to be taken on the face of it, as sufficient evidence of the first conviction (2nd Report of Law Commissioners, par. 172).

Declarations mentioned in Sections 27, 118, and 164, Act VIII of 1859, are herein referred to.

Authorized by Law to receive.—A Christian having been charged with, and convicted of, perjury for making false statements on solemn affirmation in a judicial proceeding—*held*, by Scotland, C. J., and Ellis, J., on appeal, that A at the time he made the false statement was not under a legal obligation as a witness to tell the truth, for to constitute that obligation, in case of a witness in a judicial proceeding who professes the Christian faith, the sanction of an oath on the Holy Gospel is an absolute requirement of the law (4 M. J., No. 2, p. 71). This judgment was given before the passing of the “Oaths Act of 1871.”

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

* 200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence (191).

* *Explanation.*—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of Sections 199 and 200.

It is a felony under Section 43, 6 and 7 Wm. IV, chap. 86, to cause a Registrar to make an entirely false entry of a birth, marriage, or death (Reg. v. Mason. *Vide* note under Section 177 P. C.).

[Ct. of S.]

[Uncog. Bailable.]
[Warrant.]

* 201. *Whoever knowing or having reason to believe* (26)

Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender.—
If a capital offence.

that an offence (40) has been committed, *causes any evidence of the commission of that offence to disappear*, with the *intention of screening* the offender from legal punishment, or with *that intention gives any information* respecting the offence which he knows or believes to be false, shall, if the offence (40) which he

[Ct. of S. or M. of
1st Class.][Uncog. Bailable.]
[Warrant.]

knows or believes to have been committed is punishable

If punishable with transportation.

with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transporta-

[M. of 1st Class, or
Ct. by which the of-
fence is triable.][Uncog. Bailable.]
[Warrant.]

tion for life, or with imprisonment which may extend to ten

If punishable with less than ten years' imprisonment.

years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence (40) is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Illustration.

A, knowing that B has murdered Z, assists B to hide the body, with the intention of screening B from punishment; A is liable to imprisonment of either description for seven years, and also to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined, when the thing made punishable is punishable by such law

with imprisonment for a term of six months or upwards, with or without fine.

Separate punishment should not be awarded when the prisoner has caused grievous hurt, and personally committed the offence described in this section, as this section applies to the causing the disappearance of an offence committed by another, not by oneself (1 R. C. C. R., 19).

Knowing or having reason to believe.—This section refers to prisoners other than the actual criminals, who by their causing evidence to disappear, assist the principal to escape the consequences of his offence (3 R. C. C. R., 31). In *R. v. Kaskinath Dinkar, &c.*, Lloyd, J. said, "This and the two following sections commence with precisely the same words. Now, as there is no law which obliges a criminal to give information which would convict himself, it is evident that Sections 202 and 203 could not apply to the person who committed the offence, *i. e.*, the offence which he knew had been committed," and this Section 201 should be construed in the same manner; and, looking at the only illustration which follows this section, it would appear that the law was intended to apply exclusively to "*another*" (8 Bo. H. C. R., 129).

Causes any evidence of the commission of that offence to disappear.—A commits no offence if, in exercising the right of private defence of his property against B, whom he finds near a hole in A's house, and on being attacked by B, he strikes a blow at random, and in the dark, with a stick in his hand, whereby B is killed. C and D, by assisting A in removing the body of B, cannot be convicted under this Section 201, P. C., of having caused evidence to disappear, they having no knowledge or belief that an offence had been committed, nor any intention of screening an offender (2 W. R., 43).

Prisoner was present at a murder without being aware that such an act was to be committed. Through fear, he not only did not interfere to prevent the commission of the crime, but joined the murderers in concealing the body. *Held*, he was guilty, not of abetment of murder, but of causing the disappearance of evidence of a crime under this section (6 W. R., 80).

For the intention of Screening.—Where a person is charged with giving false information under this section, with intent to save offenders from punishment, the issue to be tried is not whether such alleged offenders were, in fact, guilty or not, but merely the belief and intention of the prisoner in respect to their guilt (8 W. R., 68).

The requirements of this section are not satisfied merely because the disappearance of evidence was *likely to have* the effect of screening the offender. The Code distinguishes between intention and *mere likelihood*, and provides, in other sections, for the punishment of those who do certain acts "*intending or knowing it to be likely*" that certain results may happen. In this section there is no such alternative (5 N. W. P., H. C. R., 187).

With that intention gives any Information.—Sections 201 and 218. A Police Officer was charged under Section 201, that he, having reason to

believe that an offence had been committed, gave an incorrect information regarding this offence, which he knew or believed to be false, with intent to screen the offenders. Under Section 218, that he, being a Police Officer, framed a record, viz., his police diary and report, incorrectly, with intent to save certain persons from punishment, the issue to be tried was, whether at the time A prepared his diary, he knew, or had reason to believe, that B and C, charged with the death of D, were guilty, or whether he framed his record falsely to screen B and C. On the trial, the Judge, in putting before the jury, as a matter on which their verdict was called for, the fact that B and C were subsequently brought to trial and convicted, misdirected the jury. The subsequent conviction was no evidence at all, as against A, that B and C were in truth guilty, and if it had been evidence of B and C's guilt, such evidence was for the purposes of A's trial irrelevant (4 R. C. C. C., 27).

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

* 202. Whoever knowing or having reason to believe (26) *that an offence (40) has been committed, intentionally omits to give any information respecting that offence (40) which he is legally bound to give (43), shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine, or with both. (Triable summarily under Section 222, C. C. P.)*

Intentional omission to give information of an offence, by a person bound to inform.

Before a person can be convicted under this section there must be legal evidence (1) that he has knowledge or reason to believe that some offence has been committed; (2) an *intentional* omission to give *any* information respecting that offence; and (3) that he is legally bound to give such information.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined, when the thing made punishable by such law is punishable with imprisonment for a term of six months or upwards, with or without fine.

As remarked *ante* under Section 176, that section provides a penalty for intentionally omitting to give notice on *any subject* to a public servant: *e. g.*, A makes a false return of his income, being bound by a special law to make a correct one; here if the punishment awarded by such special law for such false return is less than six months, A has committed an offence under Section 176, but if the special law made such an act punishable with imprisonment for six months, or upwards, he could be punished under Section 202, Penal Code. This Section 202 is more especially with reference to offences against *public justice*; the former, 176, more especially with reference to offences against public servants, and contempts of order of public servants duly promulgated, and dis-

obedience of special and local laws where the punishment awarded by such special or local laws are less than six months' imprisonment under Section 202. B, a chowkeydar, intentionally omits to give evidence of a murder, or theft, he is punishable under this Section 202, such an omission being an offence against public justice.

Before a person can be convicted of an offence under this section there must be legal evidence (1) that he has knowledge or reason to believe that some offence has been committed; (2) an *intentional* omission to give *any* information respecting that offence; and (3) that he is legally bound to give that information.

Silently to observe the commission of a felony, without any endeavour to apprehend the offender, is under English law misprision. If to the knowledge there be added assent, the party will become an accomplice (4 Black. Com., 121).

That an offence has been committed, intentionally omits.—A conviction for intentionally omitting to give information of an offence which has *not been proved to have been committed*, cannot be sustained under this section. There is a law which might cover the conviction, viz., the first portion of Section 2, Regulation VIII of 1814 (1 R. C. C. R., Part III, 2).

[M. of 1st or 2nd
Class.]

[Unco. Bailable.]
[Warrant.]

* 203. Whoever knowing or having reason to believe (26) that an offence (40), has been committed, gives any information respecting that offence (40), which he knows or believes to be false, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

A prisoner's intention is immaterial to his conviction under this section of having given false information respecting an offence committed (1 W. R., 18. Queen v. Chetour Chowkeydar).

[M. of 1st Class.]

[Unco. Bailable.]
[Warrant.]

* 204. Whoever *secretes* or destroys *any document* (29) which he may be lawfully compelled to produce as evidence in a Court of Justice (20), or in any proceeding lawfully held before a public servant (21), as such, or obliterates or

Destruction of document to prevent its production as evidence.

renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Whoever secretes.—A person merely withholding a document, or not producing it on a false pretence, cannot be convicted of the offence of secreting such document specified in this section (3 N. A. N. W. P., Part 1, 64).

Any Document.—Section 175 *ante* deals with omission to produce a document (see note under that section). Special and local laws requiring production of documents, and containing penalties for destruction or obliteration of such, are not affected by this section. It is not essential that the document required, and destroyed or obliterated, be material to the point at issue; *any* document, the production of which can be lawfully required, may be the subject of destruction or obliteration, and if it is so destroyed or obliterated with intent to evade its production before the Court or public servant having power to require its production, it comes under the provisions of this section.

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.
[Warrant.]*]

* 205. Whoever *falsely personates another*, and in such *assumed character* makes any admission or statement, or confesses judgment, or causes any process to be issued, or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

False personation for the purpose of any act or proceeding in a suit.

Falsely personates another.—To constitute false personation under this section, it is not enough to show the assumption of a fictitious name. It must also be shown that the assumed name was used as a means of representing some other known individual. A mere "alias" or "incog." is no crime. The gist of the offence in Section 205 is the feigning to be *another known person*. There are sections of the Penal Code under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person, for instance, 140, 170, 171, and 415; and the last is made applicable to personation of an imaginary person by an express enactment (3 Madras Jurist, No. 4, 147).

To establish a charge under Section 211, Penal Code, it is necessary to show that the accused knew or had reason to believe that an offence had been committed. Under this Section 205 it is criminal to personate an imaginary person (1 I. J., 123).

Assumed character.—It is necessary to a conviction for false personation under Section 205, Penal Code, that the accused should have assumed the name and character of the person he is charged with having personated. The fact that he presented a petition in Court in the name of that individual—*held* (under the circumstances of this case) to be insufficient to show any intention of falsely personating such person (8 W. R. 80).

Fraudulent gain or benefit is not an essential element of the offence created by this section, and a conviction is therefore sustainable, even where the personation is with the consent of the party personated (1 Madras H. Ct. R., 450).

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
Warrant.*]

* 206. Whoever fraudulently (25) removes, conceals, transfers, or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture, or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice (20) or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 62 *ante* deals with offences where the Court may award forfeiture. Under Sections 121 and 122 forfeiture of property is compulsory. This section awards a punishment for *fraudulently* removing or concealing property to prevent its seizure as a forfeiture; it deals also with execution of decrees as well as forfeiture; the offence may be committed by any one, and not necessarily by the owners of the said property. Under this section the gist of the offence here provided for is fraud (see 18 W. R., 65).

A person who fraudulently removes property, intending thereby to prevent that property from being taken in execution of a decree made by a Collector, commits an offence, and is punishable under Section 206, P. C., and not under Section 145, Act X of 1859 (10 W. R., 47).

[*M. of 1st or 2nd
Class.*][*Uncog. Bailable.
[Warrant.]*]

* 207. Whoever fraudulently (25) accepts, receives, or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice (20) or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

This section deals with the receiver, acceptor, or claimer of property to prevent its seizure as a forfeiture (see notes on Sections 62, 122, and 206 *ante*).

[*M. of 1st Class.*][*Uncog. Bailable.
[Warrant.]*]

* 208. Whoever fraudulently (25) causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person, or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Fraudulently suffering a decree for a sum not due.

Illustration.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him, for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decrees. Z has committed an offence under this section.

Sections 206 and 207 *ante* and this section deal with those cases in which parties enter into a collusion to defeat their creditors. These sections have received few, if any, authoritative rulings, and I have been unable to find any light thrown on their provisions by the Law Commissioners' Report. The whole subject herein referred to is fully discussed in Smith's Leading Cases. It will, I think, be more profitable for the student and those administering these sections to refer themselves to the original source, than for me to make mere extracts here which would necessarily have to be very brief on account of want of space and from the nature of this work.

[*M. of 1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

* 209. Whoever fraudulently (25), or dishonestly (24), or with intent to injure (44) or annoy any person (11) makes in a Court of Justice (20) any claim which he knows to be false, shall be punished with imprisonment of either description (53) for a term which may extend to two years, and shall also be liable to fine.

This section, it will be perceived, does not make it criminal to sue *without probable cause* merely, for it is expressly laid down that the suit must have been instituted "*fraudulently, or dishonestly, or with intent to injure or annoy any person*" to warrant a criminal prosecution against the suitor. The provisions of this section were no innovation. The Regulations in force in the Company's Courts authorized the Judge, when a suit appeared to him "frivolous, vexatious, or groundless," to fine the plaintiff, and to commit him to close custody until he paid the fine (Reg. III, Bengal, 1793, Section 12; Reg. II, Madras, 1802, Section 9; Reg. IV, Bombay, 1827, Section 54).

[*M. of 1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

* 210. Whoever fraudulently (25) obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied, or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

The offences referred to in this and the four preceding sections refer to frauds committed upon the Courts of Justice. With reference to fraudulent deeds and dispositions of property, where the accused is dealt with as committing such fraud against his creditors, see Sections 421—424, *post*.

[*M. of 1st Class.*]

[*Uncog. Bailable.*
[*Warrant.*]

* 211. *Whoever, with intent to cause injury* (44) to any person (11), *institutes or causes to be instituted* any criminal proceeding against that person, or *falsely charges* any person with having committed an offence (40) *knowing that there is no just or lawful ground* for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

with fine, or with both ; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, imprisonment for seven years or upwards, shall be punishable with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine (*or with whipping in addition to, if previously convicted of the same offence, VI, 4*).

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Whoever with intent to cause injury.—This section applies not only to private individuals, but also to a Police Officer who brings a false charge of an offence with intent to injure (11 W. R. C. R., 2).

Institutes or causes to be instituted.—As remarked under Sections 176, 181, 193, and 202 of the similarity between some of those sections, so also here will be found somewhat of a similarity between this Section 211 and Section 182 *ante*. The several published rulings quoted will however have solved wherein the difference lies. The intention of causing injury is an essential in both sections. Under this Section 211, the offender must have instituted or caused to be instituted a criminal proceeding ; under the former 182 *ante*, no proceedings need actually be instituted and no false charge need be laid. The offence under Section 182 *ante* is complete as soon as ever a person gives to a public servant any false information, intending such public servant to use his lawful power to the injury or annoyance of any person.

Under Section 211, the instituting a criminal proceeding with intent to injure, knowing there to be no just or lawful grounds for such, may be treated as an offence distinct from the falsely charging a person with having committed an offence. A Police Officer, though acting upon the information of an informer, may be said to *institute* criminal proceedings against the person charged by him ; and the consent of his superior officer to the course pursued will not guarantee him from the consequence of bad faith. The prosecution when establishing the fact that a Police Officer acted knowing there to be no just grounds for proceeding, is bound to call all those on whose statements such officer said he acted (5 R. C. C. R., 8).

Falsely charged.—A false charge deliberately made before a Police Officer in view to its being brought before a Magistrate, brings the party making it within the provision of Section 211, P. C.

A complainant is not liable to punishment under this section in *all* cases in which the prosecution fails, or in which the "accused person" is acquitted. This section is applicable to those cases only in which the charge is "*falsely*" made "*with intent to cause injury, and with the knowledge that there is no just or lawful ground for such charge.*" Want of reasonable or probable cause may raise a presumption of such knowledge and intent, but a mere failure to obtain a conviction would not, of itself, be sufficient to warrant the presumption (1 R. J. P. J., No. 19, Clause 7, 170, from Registrar High Court, Calcutta, dated 21st July, 1863).

Knowing that there is no just or lawful ground.—If accused does not know at the time he makes the complaint that there are no just and lawful grounds for making the complaint, he cannot be convicted under this section. The fact that information upon which a false charge was preferred was not carefully tested by the complainant, is not a ground for indictment under this section. If accused does not know at the time he makes the complaint that there are no just and lawful grounds for making the complaint, he cannot be convicted under this section, 25th June, 1866 (2 R. C. C. R. 11).

General notes.—The mere presentation of a petition containing a false allegation, but not praying for judicial inquiry or penal proceedings, does not constitute the offence specified in Section 211, P. C. P. 43, Vol. III, Part I, N. A., N. W. P., 1863.

Where a charge of theft was reported by the police to be false—*held* that the Magistrate ought first to have inquired into the charge of theft, and passed some orders upon it before proceeding under this section to inquire into the offence of false charge (Bishoo Barick, appellant, 16 W. R., 77).

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Bailable.*
[*Warrant.*]]

*212. Whenever an offence (40) *has been committed,*

Harbouring an of- *whoever harbours or conceals* a person
fender. whom he knows or has reason to believe
(26) to be the offender, *with the intention of screening him*

[Ct. of S. or M. of
1st Class.]

[Cog. Bailable.]
[Warrant.]

from legal punishment, shall, if the offence is punishable
with death, be punished with imprison-
ment of either description for a term which
may extend to five years, and shall also be liable to fine;
and if the offence is punishable with transportation for life,

[Ct. of S. or M. of
1st Class.]

[Cog. Bailable.]
[Warrant.]

or with imprisonment which may extend to ten years, shall
be punished with imprisonment of either
description (53) for a term which may
extend to three years, and shall also be
liable to fine; and if the offence is punishable with impri-

[M. of 1st Class or
Ct. by which offence is
triable.]

[Cog. Bailable.]
[Warrant.]

sonment, which may extend to one year and not to ten
years, shall be punished with imprisonment of the descrip-
tion provided for the offence for a term which may extend
to one-fourth part of the longest term of imprisonment
provided for the offence, or with fine, or with both.

Exception.—This provision shall not extend to any case
in which the harbour or concealment is *by the husband or
wife of the offender.*

By the law of England it is only the wife who is exempted from the
penalty for receiving or harbouring an offender.

By the French Code Penal are excepted “*Les ascendants et descendants, époux ou épouse, même divorcés, frères ou sœurs des criminels recélés, ou leur alliés aux mêmes degrés.*” Mr. Livingstone’s Code for Louisiana excepts the husband or wife of the offender; his relations in the ascending or descending line, either by affinity or consanguinity; his brothers or sisters; his domestic servants. The exception to this section goes beyond the narrow line of the law of England, but stops short of both the other Codes above referred to.

Illustration.

A, knowing that B has committed dacoity, knowingly conceals B in order

to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined, when the thing made punishable by such law is punishable with imprisonment for a term of six months or upwards, with or without fine.

Offence has been committed.—This section applies to the harbouring of persons who have actually committed some offence under the Penal Code, or an offence under some special or local law, when the thing punishable under the said special or local law is punishable with imprisonment for a term of six months or upwards, whether with or without fine: *e. g.*, A trespasses upon lands or other premises belong to a Railway Company. Under Section 17, Act XVIII of 1854, he is liable to a fine of rupees twenty, and in default under Section 34 to imprisonment for a period of two months. If A abscond and B harbours him, B is not punishable under this section; but if A had committed an offence under Section 26, Act XVIII of 1854, had absconded and B harboured him, B would be liable to punishment under this section. (*With the intention of screening him.*) The essence of this offence consists in the intention with which the act is done.

Whoever harbours or conceals.—In order to sustain a conviction under this section there must be evidence of harbouring or concealing (*R. v. Sala Singh*, 2 P. R. 40).

[*Uncog. Bailable.*]
[*Warrant.*]

[*Ct. of S.*]

*213. Whoever accepts, or attempts to obtain, or agrees to accept, any gratification (161) for him-

Taking gift, &c., to screen an offender from punishment.

self or any other person (11), or any restitution of property to himself or any

other person, in consideration of his concealing an offence (40), or of his screening any person from legal punishment for any offence (40), or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be

If a capital offence.

punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be

[*Ct. of S. or M. of 1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

punished with imprisonment of either description for a

If punishable with transportation for life or with imprisonment. term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with im-

[*M. of 1st Class or Ct. by which offence is triable.*]

[*Uncog. Bailable.*
[*Warrant.*]

prisonment of the description (53) provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Section 161 *ante* deals with public servants, or persons expecting to be public servants, taking gratifications other than legal remuneration in respect of official acts. Offences which in their nature are of a complexion approaching to civil wrongs, are excepted from the provisions of this and the following section. See note 3 *post* to this section, and note 3 to Section 214 *post*.

Adultery, which may be the subject of civil action, is by the exception not an offence of the kind contemplated by this section, and it is not punishable to take a gift for "not proceeding against the adulterer." (*Queen v. G. R. Smith*, 5th December, 1865. *Vide* note by Ed. R. C. C. R., note on Section 214, P. C.).

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*214. Whoever gives or causes, or offers or agrees to give or cause, any gratification (161) to any person (11), or to restore or cause the restoration of any property (22) to any person *in consideration of* that person's *concealing an offence*, or of his screening any person from legal punishment for any offence (40), or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable

[*Ct. of S. or M. of 1st Class.*]

[*Uncog. Bailable.*
[*Warrant.*]

to fine; and if the offence is punishable with transportation

for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with

[*M. of 1st Class or Cl. by which offence is triable.*]

[*Uncog. Bailable.*]
[*Warrant.*]

imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—The provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act, irrespective of the intention of the offender, and for which act the person injured may bring a civil action.

Illustrations.

(a.) A assaults B with intent to commit murder. Here, as the offence does not consist of the assault only, irrespective of the intention to commit murder, it does not fall within the exception, and cannot therefore be compounded.

(b.) A assaults B. Here, as the offence consists simply of the act, irrespective of the intention of the offender, and as B may have a civil action for the assault, it is within the exception, and may be compounded.

(c.) A commits the offence of bigamy. Here, as the offence is not the subject of a civil action, it cannot be compounded.

(d.) B commits the offence of adultery with a married woman. The offence may be compounded.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein contained.

Certain offences may be compounded, others may not. A simple assault or an adultery may be compounded, while to compound a theft or murder is penal. The element of a defined intention as a necessary part of an offence, and the right to bring a civil action, are made the tests by which these two classes are distinguished (*vide* Section 188, C. C. P., and Notes thereto).

This Section 214, P. C., deals merely with a question of substantive law, and declares it to be an offence to compromise certain classes of offences not coming within this exception annexed thereto.

Though the bare taking of a man's own goods which have been stolen (without favour shown to the thief) is no offence (Hawk., P. C., B. 1, C. 59, Sec. 7), yet where a man either takes back the goods, or receives other amends on condition of not prosecuting, this is a misdemeanour, punishable by fine and imprisonment (*id.*, Section 5). And so in any other felony an agreement not to prosecute an indictment for reward, is punishable as a misdemeanour. Whether at common law the compounding of a misdemeanour is in any case a misdemeanour, is perhaps doubtful. Such agreements, when not made under the permission of a Court of Justice, are clearly in many cases illegal (*Collins v. Blantern*; *Beeley v. Wingfield*; *Roscoe*, 377).

"Certain parties convicted of a criminal offence, in order to avoid apprehension entered into a compromise with complainant, who agreed to accept a sum of money as costs and as compensation for the disgrace he had suffered. They accordingly sold him some property in lieu of cash. *Held* that sale was not made under illegal pressure." The report further says that "though the offence was one in which a compromise could not legally be admitted, yet as the Magistrate did admit it, and the parties acted in good faith, the position of the complainant was held not to have been affected (*Sheikh Nubee Bux v. Mussamut Beebe Hingun*, as reported at M. J. Civ. R., 157).

In consideration of concealing an offence.—A person cannot be held to have committed the offence defined in this section, merely because he had caused the restoration of stolen property where there was no evidence of his having bargained for the condonement of the offence of the theft, or of his having caused the restoration of the property in consideration of the concealment of the offence, or abandonment of legal proceedings against the offenders by aggrieved party.

A was sued as the maker of certain promissory notes for the recovery of the amount. In his written statement he denied the making of the notes. B (the plaintiff) offered to withdraw his suit if the defendant (A) would swear that he had made the alleged payments, and on A's deposing to this effect the suit was dismissed in pursuance of the agreement made by (plaintiff) B. B then applied for sanction to prosecute A for the false verification of his written statement. Sanction was given. At A's trial an objection was taken to the legality of the proceedings on the ground that the dismissal of the suit on the agreement made by B was a bar to the institution of any future proceedings civil or criminal. *Held* that such an agreement is not one that ought, on grounds of public policy, to be enforced. It is essential to the well-being of society that persons who commit offences which are of a public nature, and which are punishable as crimes, should be brought to justice. On the same principle on which is grounded the prohibition against corresponding offences, a Court cannot take cognizance of a bargain to abstain from the prosecution of a person who has committed such an offence (*R. v. Balkishen*, 3 N. W. P. H. C. R., 166).

[M. of 1st Class.]

[Uncog. Bailable.]
[Warrant.]

*215. Whoever takes or agrees or consents to take any

Taking gift to help *gratification* under pretence or on account of *helping any person to recover any movable property* of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

To take any gratification.—Taking reward to help to recover stolen goods is under the English law a felony (4 Black. Com., 136).

Where A was charged with corruptly and feloniously receiving from B money under pretence of helping B to recover goods before then stolen from B, and with not causing the thieves to be apprehended, three questions were left to the jury: 1. Did A mean to screen the guilty parties or to share the money with them? 2. Did A know the thieves and intend to assist them in getting rid of the property by promising B to buy it? 3. Did A know the thieves and assist B, as her agent and at her request, in endeavouring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the two first questions in the negative, and the third in the affirmative. *Held* that the receipt of the money under the above circumstances was a corrupt receiving of the money by A within the Statute 24 and 25 Vict. chap. 96, sec. 151 (Reg. v. Pasco. Roscoe, 378).

Helping any person to recover.—From the foregoing notes it will be seen that the English law provides for an offence similar to the one included in this section. This section refers more especially to persons who not having abetted the theft know all about it, and are willing for the sake of a reward (which will ultimately be shared by the thieves) to recover the property for the owner without letting out who the offenders are. This offence is by no means uncommon in India. I give an example which happened in my own camp. A, a thief, broke into my Moonshee's tent and stole several papers which were in a wooden box: the box was taken off wholly; he also stole certain jewels and brass plates; the papers were useless to the thief, and of some value to the Government as records. A reward was offered for apprehension of thieves, and a reward promised if even the missing records were traced and found, though conviction of culprits might be unattainable. B, a tracker, resident in the village, recovered the property, but, of course, it was all said to have been found in a field, and he denied all knowledge of who the thieves were. Could it have been satisfactorily proved that B received the reward for procuring restoration of property without using all means in his power to apprehend the offenders, he could have been punished under Section 215, P. C.

M

[*Ct. of S. or M. of
1st Class.*][*Cog. Bailable.*
[*Warrant.*]

*216. Whenever any person convicted of or charged with an offence (40), being in lawful custody for that offence (40), escapes from such custody, or whenever a public servant (21), in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence (40), who, ever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in

[*Ct. of S. or M. of
1st Class.*][*Cog. Bailable.*
[*Warrant.*]

the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; if the offence is

[*Ct. of S. or M. of
1st Class.*][*Cog. Bailable.*
[*Warrant.*]

punishable with transportation for life, or with imprisonment of ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine; and if the offence is punishable with imprisonment which may extend to one year, and not

[*M. of 1st Class or
Ct. by which offence is
triable.*][*Cog. Bailable.*
[*Warrant.*]

to ten years, he shall be punished with imprisonment of either description (53) provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

This section is to be construed as if the word "offence" denoted any-

thing made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined, when the thing made punishable by such law is punishable with imprisonment for six months or upwards, with or without fine.

Section 212 deals with the offence of harbouring an offender who having committed an offence absconds. This section deals with harbouring an offender who has escaped from custody, or whose apprehension has been ordered; this latter offence is in the eyes of the law more aggravated, and a heavier punishment is therefore awarded to it. The example given under Section 212 *ante* of an offender against a special or local law being harboured by any one, is equally applicable with reference to this section.

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[Summons.]]

*217. Whoever, being a public servant (21) *knowingly disobeys any direction of the law* as to the way in which he is to conduct himself as such public servant, *intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.* (Compare with Section 166, *ante*.)

Knowingly disobeys any direction of the law.—A public notary is not liable to punishment under the provisions of this section for registering an insufficiently stamped deed, unless it be proved that he knowingly disobeyed the law (J. C., O., Circular No. 53 of 1866).

Intending thereby to save.—To a conviction under this section, it is only necessary to show that the defendant knew that the person he released was in danger of punishment, and that defendant acted with the intention of saving him (*in re Abdool Julleel*, 2 R. J. P. J., 112).

Several persons were apprehended at night time, on suspicion of having committed culpable homicide. The Police Officer tied them together, and kept them in the village in which they had been arrested, instead of taking them to the nearest police station. The prisoners escaped in the course of the night. In order to render this section (217) applicable two conditions must be satisfied. 1st. There must be an intentional disobedience of a rule of law. 2nd. There must be a knowledge that the offender by disobedience will save a person from legal punishment. If the Police Officer's intention in keeping the prisoners in the village was merely to

wait until it was more convenient to start, the disobedience of this rule of law was not such a disobedience as this section contemplates (*R. v. Ootum Chund*, 6 P. R., 32).

[*Cl. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*218. Whoever, being a public servant (21), and being, as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which *he knows to be incorrect, with intent to cause*, or knowing it to be likely that he will thereby cause, loss or injury (44) to the public (12) or to any person (11), or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

He knows to be incorrect with intent.—Where a person is charged under this section, with framing a report incorrectly, or under Section 201, with giving false information with intent to save offenders from punishment, the issue to be tried is not whether such alleged offenders were in fact guilty or not, but merely the belief and intention of the prisoner in respect to their guilt (8 W. R., 68).

The intention is an essential ingredient in the offence contemplated by this section (8 W. R. 27).

A Police Officer negligently or improperly submitting an incorrect report of a local investigation may be punished under Section 29, Act V of 1861, in cases where the proof is insufficient to bring the case under this Section 218 (15 W. R., 17).

[*Cl. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*219. Whoever, being a public servant (21), corruptly or maliciously makes or pronounces in any stage of a judicial proceeding any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description

Public servant in a judicial proceeding corruptly making an order, report, &c., which he knows to be contrary to law.

(53) for a term which may extend to seven years, or with fine, or with both.

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, *corruptly or maliciously commits* any person for trial or to confinement, or keeps any person (11) in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, or with fine, or with both.

Corruptly or maliciously commits.—What is a reasonable complaint or suspicion must depend on the circumstances of each particular case; it must be at least founded on some definite fact tending to throw suspicion on person arrested. Any wilful excess by a Police Officer of his legal powers of arrest is punishable by this Section 220 (7 W. R. 3).

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*221. Whoever, being a public servant (21), legally bound (43) as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence (40), intentionally omits (33) to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :

Intentional omission to apprehend on the part of a public servant bound by law to apprehend.

Punishment.

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

With imprisonment of either description (53) for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with death ; or

[*Ct. of S. or M. of
1st Class.*][*Uncog. Bailable.*
[*Warrant.*]

With imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with transportation for life, or imprisonment for a term which may extend to ten years; or

[*M. of 1st or 2nd
Class.*][*Uncog. Bailable.*]

With imprisonment of either description (53) for a term which may extend to two years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with imprisonment for a term less than ten years.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

In a charge under this section, the nature of the office held by the accused should be entered, so that it may at once be apparent whether he was under any legal obligation to apprehend or keep in confinement. The name of the person suffered to escape should also be entered (1 R. C. C. Cir. 19).

[*Ct. of S.*][*Uncog. Not bailable.*
[*Warrant.*]

*222. Whoever, being a public servant (21), legally bound (43) as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice (20) for any offence (40), or if the person was lawfully committed to custody, intentionally omits (33) to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :

Punishment.

With transportation for life or with imprisonment of either description (53) for a term which may extend to

fourteen years, with or without fine, if the person in confinement or who ought to have been apprehended is under sentence of death ; or

[*Ct. of S.*]

[*Uncog. Not bailable.*]
[*Warrant.*]

With imprisonment of either description (53) for a term which may extend to seven years, with or without fine, if the person in confinement or who ought to have been apprehended is subject, by a sentence of a Court of Justice (20), or by virtue of a commutation of such sentence, to transportation for life, or penal servitude for life, or to transportation or penal servitude or imprisonment for a term of ten years or upwards ; or

[*Ct. of S. or M. of 1st Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

With imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both, if the person in confinement or who ought to have been apprehended is subject by a sentence of a Court of Justice to imprisonment for a term not extending to ten years.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined. As to what the charge should contain, see note under preceding section.

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*223. Whoever, being a public servant (21), legally bound (43) as such public servant to keep in confinement any person (11) charged with or convicted of any offence (40) or lawfully committed to custody, negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine or with both.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined. As to what the charge should contain, see note under Section 221 *ante*.

An escape of a person arrested upon criminal process is punishable

under English law by fine or imprisonment. But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner. Officers, therefore, who after arrest *negligently* permit a felon to escape are also punishable by fine (4 Black. Com., 133).

The words "or if the person was lawfully committed to custody" after the word "offence" both in this and the preceding sections, were first inserted by Act IV of 1867, and finally incorporated with the Code by Section 8 of Act XXVII of 1870.

Convicts promoted to be "convict warders" or "convict work overseers," are not public servants within the meaning of this section (5 R. J. P. J., 140).

[M. of 1st or 2nd
Class.]

[Cog. Bailable.]
[Warrant.]

*224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence (40) with which he is charged, or *of which he has been convicted*, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence (40), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Explanation.—The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

By English law, "an escape of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is an offence against public justice, and the party himself is punishable by fine or imprisonment" (4 Black. Com., 133).

On which he was convicted.—A prisoner under sentence of transportation for housebreaking escaped from custody on his way to undergo such sentence. On his apprehension he was tried under Section 224, P. C.

Held, Scotland, C. J., and Collet, J., on appeal, that the sentence was illegal: the prisoner had not been actually sent to a penal settlement, and had not returned before his time; he therefore could only be charged under

Section 226 for escaping from lawful custody (Reg. v. Remasondary Marava).

See note under Section 225. *In re* Queen v. Kalisankar.

A prisoner escaping from Havalat may be tried and sentenced under this Section 224 previous to his being tried for the crime for which he was originally apprehended.

The punishment for escape from lawful custody must be in addition to the punishment awarded for the substantive offence: contemporaneous sentences are not legal. Where such had been awarded, the High Court separated the sentences, making them run one on the expiry of the other (5 R. C. C. R., 7).

[M. of 1st or 2nd
Class.]

[Cog. Bailable.]
[Warrant.]

*225. Whoever intentionally offers any resistance or illegal (43) obstruction to the *lawful apprehension* of any other person for an offence (40), or *rescues* or attempts to rescue any other person from any custody in which that person is *lawfully detained* for an offence (40), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

[Ct. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

Or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with transportation for life, or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine ;

[Ct. of S.]

[Cog. Not bailable.]
[Warrant.]

Or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine ;

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

Or, if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice (20), or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

Or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description (50) for a term not exceeding ten years, and shall also be liable to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

By the English law it is held that the party opposing such arrest became thereby *particeps criminis* (4 Black. Com., 132). A rescue therefore of one apprehended for felony is felony; for treason, treason; and for a misdemeanor, a misdemeanor also (*Id.*, p. 134).

Where the record of the person aided is set forth, and is produced by the proper officer, no evidence is admissible to contradict that record (*Reg. v. Shaw*. Roscoe, 825 to 827).

Lawful apprehension.—It was held that Section 225, P. C., is not restricted to cases in which the person making the arrest is a Police Officer, but that it applies to any lawful apprehension.

Or rescues.—The word rescue, or some word equivalent thereto, must appear in the indictment, and the allegation must be proved by showing that the act was done forcibly, and against the will of the officer who had the party rescued in custody (*Reg. v. Burrige*).

Lawfully detained.—If the imprisonment be so far irregular that the party imprisoned would not be guilty of prison breach by making his escape, a person rescuing him will not subject himself to the punishment for rescue (*Hawk P. C.*, B. 2, c. 21, secs. 1, 2).

Where prisoners were convicted under Section 224, for escape, 225, for rescuing from lawful custody, and under Section 353 for using criminal force in so doing, and sentenced to separate punishments under each section.—*Held* by Macpherson, J., and E. Jackson, J., that the prisoners

had only done one act, and were guilty of only one offence, and should only have been found guilty under Sections 224 and 225, of escape and rescuing respectively, and sentenced accordingly (3 B. L. R., Part XIII, 14).

[*M. of 1st or 2nd Class.*]

[*Cog. Bailable.*]
[*Warrant.*]

225A. Whoever escapes or attempts to escape from any custody in which he is lawfully detained for failing under the Code of Criminal Procedure to furnish security for good behaviour, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

This Section, 225A, was inserted by Section 9 of Act XXVII of 1870, and by Section 13, Act XXVII of 1870, the following chapters of the Penal Code, namely, IV and V shall apply to offences punishable under this Section 225A.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*226. Whoever, having been lawfully transported, turns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

Vide notes under Section 224 P. C.

[*Ct. by which offence is triable.*]

[*Uncog. Not bailable.*]
[*Summons.*]

*227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

[*Ct. in which the
offence is committed,
subject to provisions
in Chap. xxxii.
C. P. C.*

[*Uncog. Available.]*
[*Summons.*]

*228. Whoever *intentionally* offers any insult or causes any interruption to any public servant, while such public servant (21) is sitting in any stage of a *judicial proceeding*, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.

(*Intentionally*).—Before conviction can be had under this section *intention* to insult must be proved (15, W. R., 62).

Judicial proceeding.—Every person is bound to furnish information to a registering officer (under Act VIII of 1871) when required by him to do so. And in this section the words "*judicial proceeding*" include any proceeding under Act VIII of 1871 section 82.

An officer before whom, while acting in a particular capacity, an offence under this section is committed, cannot in another capacity take up and try the offence (12 W. R., p. 18).

Held that prevarication while giving evidence does not constitute the offence contemplated by this Section 228 (4 Bo. R., 6). Refusing or neglecting to return direct answers to questions does not come under this section (*Id.* 7).

No conviction can be had under this section simply because witnesses in a cause give inconsistent evidence reluctantly and take up the time of the Court (15 W. R., 5).

[*M. of 1st Class.*]

[*Uncog. Available.]*
[*Summons.*]

*229. Whoever, by personation or otherwise, shall intentionally cause or knowingly suffer himself to be returned, empannelled, or sworn as a jurymen or assessor in any case in which he knows he is not entitled by law to be so returned, empannelled, or sworn; or, knowing himself to have been so returned, empannelled, or sworn, contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Personation of a juror or assessor.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT
STAMPS.

Act XXIII of 1870, relating to coinage and the Mint, received the assent of the Governor-General in Council on 6th September, 1870.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.,) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or transportation, or *penal servitude* or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

230. Coin is metal *used for the time being* as money and stamped and issued by the authority of some State or Sovereign power (17) in order to be so used.

Used for the time being.—Gold mohurs are coins “for the time being” used as money within the meaning of this section. It is not necessary to satisfy the ordinary definition of money that the coin should be a legal tender receivable at a value in rupees fixed by the law (5 N. W. P., H. C. R., 188).

Coin.—(Fr., *coign*, Lat., *cuneus*,) a piece of metal stamped with certain marks, and made current at a certain value. Strictly speaking, coin differs from money as the species differ from the genus. Money is any matter, whether metal, paper, beads, shells, &c., which have currency as a medium in commerce. Coin is a particular species always made of metal and struck, all ordering to a certain process called coining (W. L. L., 281).

The old Section 230 was amended by Act XIX of 1872. The object and reasons for this amendment were given by Mr. Hobhouse in the following words:—

“The primary object of this Bill is to check the practice of counterfeiting the copper coin of Native States. These counterfeits are freely circulated in parts of British India, and the result is stated to be injurious to our currency. The Penal Code prohibits the counterfeiting of coin.

But 'coin' is defined as 'metal stamped and issued by the authority of some *Government*,' and 'Government,' by Section 17, denotes 'the person or persons authorized by law to administer executive government in any part of *British India*.' It has thus happened, accidentally no doubt, that the coin of Native States is not coin within the meaning of the Act. This defect it is desired to amend.

"The opportunity has been taken to make another amendment. Section 230 of the Code defines coin as metal 'used' as money. It has been suggested that the definition may possibly be held to include old coin, such as a Græco-Bactrian stater, formerly used as money, but now regarded only as a curiosity. The Bill, therefore, proposes to introduce before 'used' the words 'for the time being.'"

Coin stamped and issued by the authority of the Queen,
Queen's coin. or by the authority of the Government of
 India, or of the *Government* of any Presidency, or of any Government in the Queen's dominions,
 is the Queen's coin.

Government.—J. C.'s minute, dated 10th November, 1868, expressed an opinion that the word 'Government' in Section 230 of the I. P. C. may be construed in the ordinary acceptance of the term, and not in the restricted sense put on it by section 17 (see Session case, D. C. Lucknow, *Queen v. Juggun*, charge under Section 231, I. P. C., dated 4th March, 1870).

Illustrations.

- (a.) Cowries are not coin.
- (b.) Lumps of unstamped copper, though used as money, are not coin.
- (c.) Medals are not coin, inasmuch as they are not intended to be used as money.
- (d.) The coin denominated as the Company's rupee is the Queen's coin.

[*Cog. Not bailable.*]
 [*Warrant.*]

[*Cl. of S.*]
 * 231. Whoever counterfeits (28), or knowingly performs
Counterfeiting coin. any part of the process of counterfeiting
 coin (230), shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A person commits this offence, who, intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

Counterfeiting, colouring, impairing, clipping, filing the current coin of the realm is felony. Buying, selling, importing, exporting, or uttering counterfeit coin is also felony. Defacing current coin is a misdemeanor.

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, or for an attempt to commit such an offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

"It is not essential to counterfeiting that the imitation should be exact" (see explanation to Section 28 *ante*). This is similar to the English law, where any trifling variance from the real coin in the inscription, &c., or because of a different metal from the real coin being used, does not take the case out of the Statute. The counterfeit coin must resemble some coin used as money in circulation.

[*Cl. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

* 232. Whoever counterfeits (28), or knowingly per-
Counterfeiting the forms any part of the process of counter-
Queen's coin. feiting, the Queen's coin (230), shall be
punished with transportation for life, or with imprisonment
of either description (53) for a term which may extend to
ten years, and shall also be liable to fine.

Under English law, defacing any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, or using any machine or instrument for the purpose of bending the same, is an indictable misdemeanor.

To constitute the offence defined in this section there must be an intention that the coins will be used as Queen's coin, or a knowledge that they are likely to be used as such. Such knowledge or intention will be inferred from the mere fact of counterfeiting, unless under circumstances which conclusively negative it; but a distinction must be drawn between a deception practised for sheer mischief and one practised for wrongful loss or gain—the former is not an offence under the Penal Code (*R. v. Shum Soodeen*, 3 P. R., 75).

[*Ct. of S. or M. of
1st Class.*][*Cog. Not bailable.*
[*Warrant.*]

* 233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells, or disposes of *any die or instrument* for the purpose of being used, or knowing or having reason to believe (26) that it is intended to be used, for the purpose of counterfeiting (28) coin, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

Making or selling
instrument for counter-
feiting coin.

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

* 234. Whoever makes or mends, or performs *any part* of the process of making or mending, or buys, sells, or disposes of *any die or instrument* for the purpose of being used or knowing or having reason to believe (26) that it is intended to be used, for the purpose of counterfeiting (28) the Queen's coin (230), shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Any part.—With reference to the wording of this and the previous section, it may be noted that the English Statute provides for instruments made for counterfeiting “any part, or parts of both, or either of such sides” of the coin.

Any die or instrument, &c.—It is to be observed that although the *die* is specially provided for in this and the preceding section as the instrument by which the metal is marked, so as to represent a coin, or in other words, the instrument by which the act of counterfeiting is completed; it is further provided that any instrument used in the process of coining falling within the same category as the die as an “instrument for the purpose of being used for the purpose of counterfeiting” is included.

[*Ct. of S. or M. of
1st Class.*][*Cog. Not bailable.*
[*Warrant.*]

* 235. Whoever is in possession of any instrument or material for the purpose of using the same for counterfeiting (28) coin, or knowing or having reason to believe (26) that the same is intended to be used for that pur-

Possession of instru-
ment or material for
the purpose of using
the same for counter-
feiting coin.

pose, shall be imprisoned with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine ; and if the coin to be counterfeited is the Queen's coin, shall be punished with imprison-

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

ment of either description for a term which may extend to ten years, and shall also be liable to fine.

This section applies to implements, &c., not so significantly marked as adapted for counterfeiting particular coins, found in the possession of any person, regarding which there may be independent proof, circumstantial or positive, that he had the intention of employing the same for the purpose stated.

It is felony under the English law to make, mend, or have in your possession any coining tools, bearing the impress of the current coin of the realm.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

* 236. Whoever, being within British India (15) abets (107) the counterfeiting (28) of coin (230) out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Abetting in India
the counterfeiting out
of India of coin.

This is special legislation, similar to that in Section 121 *ante*, and the extent of the operation of this section may be doubtful. In dealing with it, the fact that it is an enactment prior in time to the Stat. 28 & 29 Vic., c. 17, and 32 & 33 Vic., c. 98, should be remembered. This section provides for what would not otherwise be an offence *under* this code.

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Not bailable.*]
[*Warrant.*]

* 237. Whoever imports to British India (15), or exports therefrom, any counterfeit (28) coin, knowing or having reason to believe (26) that the same is counterfeit, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall be also liable to fine.

Import or export of
counterfeit coin.

Merchants in various parts of the country had been in the habit for many years of sending copper to the Nawab or Loharoo, who turned the metal in mints established for the purpose into small round pieces, upon

which a certain stamp was impressed. The stamp was not purporting to resemble the mark on any legal coin. These pieces of copper were then sold in the bazaars in British India by weight, and used as money. It was generally believed that the Nawab had authority to establish the mints, and issue this copper as coin. *Held* that the pieces of copper were not counterfeit coin (5 P. R., 59).

[Ct. of S.]

[Cog. Not bailable.]
[Warrant.]

*238. Whoever imports into British India (15), or exports therefrom, any counterfeit (28) coin Import or export of counterfeits of the Queen's coin. *which he knows* or has reason to believe (26) to be a counterfeit of the Queen's coin (230), shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Which he knows.—In cases under this and the preceding section the accused's guilty knowledge must be proved; unless guilty knowledge be stated in the charge, and proved the same as any other fact, the accused is entitled to an acquittal.

[Ct. of S., or M. of
1st Class.][Cog. Not bailable.]
[Warrant.]

*239. Whoever, having any counterfeit (21) coin which Delivery to another of coin, possessed with the knowledge that it is counterfeit. at the time when he became possessed of it he knew to be counterfeit, fraudulently (25), or with intent that fraud may be committed, delivers the same to any person (11), or attempts to induce any person to receive it, shall be punished with imprisonment of either description (53) for a term which may extend to five years, and shall also be liable to fine.

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government, for the periods specified in their respective sentences, of persons sentenced within the territories of any native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government duly authorised in that behalf by such native Prince or State, or by the Governor-General in Council, is one of the presidency judges.

This section is directed against professional utterers, or against a person other than the coiner who procures, or obtains, or receives counterfeit coin, and not to the offence committed by the coiner (3 H. C. N. W. P. R., 150).

[*Ct. of S., or M. of 1st Class.*]

[*Cog. Not bailable.*
[*Warrant.*]

* 240. Whoever, having any counterfeit (28) coin which is a counterfeit of the Queen's coin (230), and which at the time when he became possessed of it he knew to be a counterfeit of the Queen's coin, fraudulently (25), or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

To bring the accused guilty under this section the following facts must be proved :—(1). Delivery of the coin, or attempt to induce some one to receive such coin. (2). That the said coin is counterfeit. (3). That accused knew that the coin was counterfeit. To be possessed of bad coin innocently received is no offence.

[*M. of 1st or 2nd Class.*]

[*Cog. Not bailable.*
[*Warrant.*]

* 241. Whoever delivers to any other person (11) as genuine, or attempts to induce any other person to receive it as genuine, any counterfeit coin which he knows to be counterfeit (28), but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration.

A, a coiner, delivers counterfeit Company's rupees to his accomplice B for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the rupees for goods to D, who receives them not knowing them to be counterfeit. D, after receiving the rupees, discovers that they are counterfeit, and pays them away as if they were good. Here D is punishable

only under this section, but B and C are punishable under Section 239 or 240, as the case may be.

An important distinction is made in regard to the uttering of counterfeit coin, between the utterer by profession (Section 239 *ante*) and the casual utterer, who having heedlessly received a counterfeit coin, in the course of his business, takes advantage of the next person with whom he deals to pay it away.

[*Cl. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*242. Whoever, fraudulently (25), or with intent that fraud may be committed, is in possession of counterfeit (28) coin, having known at the time when he became possessed thereof, that such coin was counterfeit, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

Possession by the accused must be proved to be fraudulent, or with intent to defraud, and that he knew when he became possessed of the coin that it was counterfeit coin; unless the proof of guilty knowledge and intent is clear, accused ought to be acquitted. Mere possession of counterfeit coin obtained innocently is no offence. Accused must deliver, or attempt to deliver, the coin as genuine before any criminal liability can attach.

[*Cl. of S., or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*243. Whoever, fraudulently (25), or with intent that fraud may be committed, is in possession of counterfeit (28) coin which is a counterfeit of the Queen's coin (230), having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

On the trial of indictments for uttering, or putting off or uttering counterfeit coin, knowing it to be counterfeit, it is the practice, as in cases of forgery, to receive proof of more than one uttering committed by the party at the same time, though only one uttering be charged in the indictment (1 Russ. 85, 2 Russ. 697). There appears to be this difference between evidence admissible in forgery and uttering counterfeit

coin, that utterings after that for which the indictment is laid, may be given in evidence to show guilty knowledge, as well as those which take place before (*Reg. v. Forster*). Whether evidence is admissible of uttering other forged instruments subsequently with that with which the prisoner is charged, seems to some extent doubtful: proof of the prisoner's conduct in other transactions is admissible; such evidence, far from being foreign to the point in issue, is extremely material, for the head of the offence charged on the prisoner is that he did the act with knowledge, and it would seldom be possible to ascertain under what circumstances the uttering took place (whether in ignorance or with intention to commit fraud) without inquiring into the demeanour of the prisoner in the course of other transactions (*Roscoe*, 91).

Whoever fraudulently or with intent that fraud may be committed.—Where a prisoner on a charge under this section admitted the possession, but denied fraudulent intention, and the Sessions Judge recorded a plea of guilty, and convicted the accused thereon under Section 362, Act XXV of 1861 it was held that conviction was bad, as the acknowledgment of the prisoner did not extend to an admission of fraud, which was the gist of the offence (5 N. A., N. W. P., Part II., 217, 1864).

A sends a boy to buy some articles at the shop of B, and gives him a counterfeit coin to pay for them, the boy makes the purchase and gives the coin. A is guilty of uttering the false coin to B, as well as to the boy. But the boy could not be guilty of an offence, unless he also knew, or had reason to believe, that the coin was counterfeit (*R. v. Giles*, 1; *Wood, C. C.*, 166; *S. M.*, Sec. 89).

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*244. Whoever, being employed in any mint lawfully established in British India (15), does any act (33), or omits (33) what he is legally bound to do (43), with the intention of causing any coin issued from the mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Employé in a mint causing coin to be of a different weight or composition from that fixed by law.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*245. Whoever, *without lawful authority*, takes out of any mint lawfully established in British India (15), any coining tool or instrument, shall be punished with imprisonment of

Unlawfully taking from a mint any coining instrument.

either description (53) for a term which may extend to seven years, and shall also be liable to fine.

The *onus probandi* of taking without lawful authority is on the prosecutor and not on the accused. On this point the Penal Code is not the same as the English statute.

[Ct. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

*246. Whoever fraudulently (25) or dishonestly (24) performs on any coin any operation which diminishes the weight *or alters* the composition of that coin, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

Fraudulently or dishonestly diminishing the weight or altering the composition of any coin.

performs on any coin any operation which diminishes the weight *or alters* the composition of that coin, shall be punished with imprisonment of either description (53) for a term which may extend to three

Explanation. A person who scoops out part of the coin, and puts anything else into the cavity, alters the composition of that coin.

See note under Section 249, *post*.

[Ct. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

*247. Whoever fraudulently (25) or dishonestly (24) performs on any of the Queen's coin (230) any operation which diminishes the weight *or alters* the composition of that coin, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Fraudulently or dishonestly diminishing the weight or altering the composition of Queen's coin.

performs on any of the Queen's coin (230) any operation which diminishes the weight *or alters* the composition of that coin, shall be punished with imprisonment of either description (53) for a term which

may extend to seven years, and shall also be liable to fine.

See note under Section 249, *post*.

[Ct. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

*248. Whoever performs on any coin (230) any operation *which alters* the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description (53) for a term which

Altering appearance of any coin with intent that it shall pass as a coin of different description.

performs on any coin (230) any operation *which alters* the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description (53) for a term which

may extend to three years, and shall also be liable to fine.

See note under Section 249, *post*.

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*249. Whoever performs on any of the Queen's coin (230) any operation *which alters* the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Altering appearance
of the Queen's coin
with intent that it
shall pass as coin of a
different description.

Which alters.—248-49.—In these sections the words “fraudulent” and “dishonest” are not included. It is not therefore necessary to prove fraudulent purpose. Alteration and intention to pass such altered coin as coin of a different description is sufficient.

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*250. Whoever, having coin in his possession with respect to which the offence defined in Section 246—(Fraudulently diminishing weight or altering composition of any coin)—or 248 (Altering appearance of any coin with intent that it shall pass as a coin of different description)—has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently (25), or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description (53) for a term which may extend to five years, and shall also be liable to fine.

Delivery to another
of coin possessed with
the knowledge that it
is altered.

Under English law, if any person shall tender or put off any coin defaced, stamped, or bent as mentioned in notes to 231, 232, and 235 *ante*, he will be liable to a fine not exceeding forty shillings summarily.

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*251. Whoever, having coin in his possession with respect to which the offence defined in Section 247—(Fraudulently diminishing weight or altering composition of the Queen's coin) or 249—(Altering appearance of the Queen's coin with intent that it shall pass as a coin of different description—has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently (25), or with intent that fraud may be committed, delivers such coin to any other person (11), or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

250-251. These sections are for punishment of traders and deliverers of altered coin.

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*252. Whoever, fraudulently (25), or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the Sections 246—(Fraudulently diminishing weight or altering composition of any coin) or 248—(Altering appearance of any coin with intent that it shall pass as a coin of different description)—has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*253. Whoever, fraudulently (25), or with intent that

Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof, fraud may be committed, is in possession of coin with respect to which the offence defined in either of the Sections 247—(Fraudulently diminishing weight or altering composition of the Queen's coin) or 249—(Altering appearance of the Queen's coin with intent that it shall pass as a coin of different description)—has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description (53) for a term which may extend to five years, and shall also be liable to fine.

[*M. of 1st or 2nd Class.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*254. Whoever delivers to any other person (11) as genuine, or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in Sections 246, 247, 248, or 249, has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed or attempted to be passed.

The person punishable by this section is any one who has altered coin in his possession, and passes or attempts to pass it off to others; but he must be aware that the coin he tries so to pass off *is* an altered coin, and that it has been altered by one or other of the operations mentioned in preceding sections of this Code.

[*Cl. of S.*]

[*Cog. Bailable.*]
[*Warrant.*]

*255. Whoever counterfeits (28), or knowingly performs any part of the process of counterfeiting, any stamp issued by Government (17), for the purpose of revenue, shall be

Counterfeiting a
Government stamp.

punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence (255) who counterfeits (28) by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

*256. Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe (26) that it is intended to be used, for the purpose of counterfeiting (28) any stamp issued by Government (17) for the purpose of revenue, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Having possession
of an instrument or
material for the pur-
pose of counterfeiting
a Government stamp.

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

*257. Whoever makes, or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe (26) that it is intended to be used for the purpose of counterfeiting (28) any stamp issued by Government (17) for the purpose of revenue, shall be punished with imprisonment of either description (53), for a term which may extend to seven years, and shall also be liable to fine.

Making or selling
instrument for the pur-
pose of counterfeiting
a Government stamp.

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

*258. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe (26) to be a counterfeit (28) of any stamp issued by Government (17) for the purpose of revenue, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Sale of counterfeit
Government stamp.

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Bailable.*
[Warrant.]]

*259. Whoever has in his possession any stamp which he knows to be a counterfeit (28) of any stamp issued by Government (17) for the purpose of revenue, intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Bailable.*
[Warrant.]]

*260. Whoever uses as genuine any stamp, knowing it to be a counterfeit (28) of any stamp issued by Government (17) for the purpose of revenue, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, or with fine, or with both.

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Bailable.*
[Warrant.]]

*261. Whoever fraudulently (25), or with intent to cause loss to the Government (17), removes or effaces from any substance bearing any stamp issued by Government for the purpose of revenue, any writing or document (29) for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
[Warrant.]]

*262. Whoever fraudulently (25), or with intent to cause

Using a Government stamp known to have been before used, loss to the Government (17), uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

[*Ct. of S. or M. of 1st Class.*]

[*Cog. Bailable. Warrant.*]

*263. Whoever fraudulently (25), or with intent to cause loss to Government (17), erases or removes from a stamp issued by Government for the purpose of revenue any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

Act XI of 1870 (The Indian Weights and Measures' Act) received the assent of His Excellency the Governor-General on 1st April, 1870; but the Home Government have disallowed this Act, and in the Home Government's decision the public doubtless in a general way concur. It cannot well be denied that that Act did not carry with it the sympathy of the people. From Mr. Stephen's speech in council it appears, "that the difference between the Government of India and the Secretary of State was one of degree rather than principle." See *Gazette of India*, dated 19th August, 1871, p. 1182. Subsequent to this on the 30th October,

1871, Act XXXI of 1871, the Indian Weights and Measures of Capacity Act received the assent of the Governor-General in Council.

Section 5, Act VI of 1864 provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan (Para. 6, Circular, No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death*, or *penal servitude*, or imprisonment for *more than six years*, shall be whipped (Section 7, Act VI of 1864).

Throughout the United Kingdom all articles sold by weight, must be sold by *avoirdupois* weight (except precious metals and precious stones, which may be sold by troy weight); and drugs which if sold by retail may be sold by apothecaries' weight; and all contracts for sale by weight or measure, except when an express agreement is made to the contrary, are considered to refer to these standards (1 Black. Com., 272).

Measure (*mensura*, Lat.), that by which anything is measured, the rule by which anything is adjusted or proportioned (W. L. L., 600).

Weights and measures, instruments for reducing the quantity and price of merchandise to a certainty, that there may be less room for deceit and imposition (W. L. L., 980).

In determining different customs as to standards of weights and measurement, the existence or otherwise of the particular custom in the particular locality or thing which is the subject of dispute must be looked to (1 W. R., 224).

No mention is made in this Chapter for the *fraudulent use of a true balance* as such an offence falls more properly within the definition of cheating.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*264. Whoever fraudulently (25) uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

Fraudulent use of
false instrument for
weighing.

Often grain-dealers have false balances artfully contrived to elude detection in the use of them; such articles carry with them a presumption of fraudulent intention, which necessarily brings them under the provisions of this section.

Under 5th & 6th Wm. IV., c. 63, s. 28, an inspector of weights and measures had entered the appellant's premises and seized a pair of scales

which he had in use; and being summoned he was convicted in a penalty of £5, and the scales were ordered to be forfeited. A special case was stated for the opinion of this court, the question being whether the magistrates had power to convict the appellant and order the destruction of the scales under the following circumstances; the scales were admitted to be unjust in the way they were first constructed, as one of them hung lower than the other. Two brass balls, however, had since been hung to the beam, and if a certain quantity of small shot was poured into these the scales became correct. The balls were movable, and the shot could be moved at pleasure.

The Court (Cockburn, C. J. and Blackburn, J.) held that the conviction was right. They did not decide the question whether the use of the balls and shot to adjust a false pair of scales was illegal, but they were of opinion that as these contrivances were not permanently fastened to the machine there was evidence upon which the magistrates were justified in convicting (3 M. J., 283. *Carr v. Stringer*).

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*265. Whoever fraudulently (25) uses any false weight or false measure of length or capacity, or fraudulently uses any weight or measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

The question as to how far a master is liable for the criminal acts of his servants is fully treated of in Sconce's Master and Servant VIII. *Vide* the principles there discussed, and illustrated by *R. v. Almon*. See note to Section 500 *post*, and apply to charges under this and the preceding section.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*266. Whoever is in possession (27) of any instrument for weighing, or of any weight or of any measure of length or capacity, which *he knows to be false, and intending* that the same may be fraudulently used, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

He knows to be false and intending.—The mere possession of weights in

excess of the authorised standard will not support a conviction under this section, without a fraudulent intent being proved (1 Bo. H. Ct. R., 181).

[*M. of 1st or 2nd Class.*]

[*Unrecog. Bailable.*]
[*Summons.*]

*267. Whoever makes, sells, or disposes of any instrument for weighing, or any measure of length or capacity, which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Section 16, Act XXXI of 1871, provides for the punishment of parties guilty of counterfeiting marks used by a Warden under Section 14 of that Act.

Vide note under Section 265 *ante*, as to a master's liability for the criminal acts of his servants.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY, AND MORALS.

Besides the offences given in this chapter, and the punishments herein assigned, offences affecting the public health, safety, convenience, decency and morals, are dealt with under Municipal Bye-Laws, which in all large towns are framed under the sections of the Municipalities Acts: XVIII of 1864, XXII of 1865, and XV of 1867, and have the force of law (and Chapter XXXIX C. C. P. deals with local nuisances of a public character, and lays down the procedure for the removal of said nuisances). The above Acts provide also for the levy of duties to meet the necessary expenditure for Municipal Police and conservancy, and some of them for education. Where public nuisances are expressly made punishable by any special or local law, or rules having the force of law, the punishment provided in this chapter is not applicable.

Section 5, Act VI of 1864 provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death*, or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

*268. A person (11) is guilty of a public (21) nuisance who does any act (33), or is guilty of an illegal (43) omission (33), which causes any common injury (44), danger, or annoyance to the public or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

There must be an act or illegal omission which causes injury, danger, or annoyance to some class of the public to constitute a public nuisance.

A public or common nuisance is such an inconvenient or troublesome offence, as annoys the whole community in general, and not merely some particular person, and therefore this is indictable. It may be both indictable and actionable (*Rose v. Graves*). The existence of the matter as a *public* nuisance depends upon the number of persons annoyed, and is a fact to be judged by a Jury (*Reg v. White*). A nuisance near a highway, where the air thereabouts is corrupted, is a public nuisance (*Reg. v. Pappineau*). Making great noises in the night, as with a speaking trumpet, has been held to be an indictable offence, if done to the disturbance of the neighbourhood (*Reg. v. Smith*). "Tom-toming at night may therefore be a public nuisance." The carrying on of an offensive trade is indictable where it is destructive of the health of the neighbourhood, or where it renders the houses untenable or uncomfortable (*Reg. v. Davey*). No length of time will legitimate a nuisance, and it is immaterial how long the practice has prevailed: though twenty years user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of long standing (*Weld v. Hornby*). A man may be guilty of a nuisance by the act of his agent or servant: thus, it has been ruled that the directors of a Gas Company are liable for an act done by their superintendent and engineer under a general authority to manage their work, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued (*Reg. v. Medley Roscoe*, 729 to 737).

The owner of a business so conducted by his agents and servants as to cause a public nuisance, is liable to an indictment, although the nuisance is occasioned by the acts of his servants, contrary to his general orders, and he is personally ignorant of the manner in which the business is really conducted. Blackburn, J. said: "Where a person maintains works by his capital and his servants, and conducts them so that they are in point of fact a nuisance; if the circumstances under which he maintains those works are such that for a private nuisance a civil action by a private person might be supported; if the nuisance inflicts an injury upon a public right, so that a private action would not lie, but the remedy would be by indictment,—the same proof that would prove the nuisance, so as to enable a person to bring an action, would prove the nuisance so as to entitle the public to indict (10 Cox C. C., 340; S. C. 1 L. R., 9 B., 702).

In re R. v. Harris, the prisoners were charged with indecent exposure and indecent conduct in a public urinal. For the prisoners it was urged that in all cases where such convictions had been upheld the offence had been committed in a public place—*i. e.*, either in a public thoroughfare, or where the prisoners could be seen by all the public. The Court (Bovill, Willis, Hannen, Channell, Pigott) affirmed the conviction. There was sufficient proof of the publicity of the place to make the conduct of the prisoners an offence against public decency. It was enough to prove that the urinal was near to a public thoroughfare, and was open to the use of all the public. The size of the place could not affect the question, as long as it was a place of public resort (6 M. J., 313).

A common gaming-house is one which is kept or used for profit or gain, and may constitute a public nuisance; but it cannot be held, in the absence of evidence of any actual annoyance to the public, that every person who admits a gambler into his house, and all persons who gamble therein, are guilty of a public nuisance within the meaning of this section. In England it has been held to be a nuisance to keep a common gaming-house (*R. v. Rogier*; *R. v. Taylor*). The term "common gaming-house" in England is understood in the same sense as it is defined in Section 14 of the Bombay Act of 1866, and similar also to the deposition contained in Section 1, Act III of 1867 (*R. v. Hâu Nágji*, 7 Bo. H. C. R., 75). Gaming is not punishable by law unless it be carried on in public places or thoroughfares, or in common gaming-houses. Common gaming-houses are houses in which instruments of gambling are kept or used for the profit or gain of the owner or occupier, whether by way of charge for the use of the instrument of gaming or of the houses, or otherwise howsoever (*R. v. Sujjard Ali*; also 3 H. C. N. W. P. R., 134).

Mussamut Begum, petitioner, H. Ct. N. W. P., Criminal side, Appellate Jurisdiction, dated 18th August, 1870. The petitioner was convicted of having committed a public nuisance under Section 290, I. P. C. The prosecution proved that the petitioner was a prostitute, and that on three occasions she visited the *dák bungalow*; on the first two occasions she was warned by the *khangsamah* not to come again, and on the third occasion she was handed over to the police. The magistrate found her guilty of the offence charged, "for continuing to go to the *dák bungalow*, a public-house, with the object of prostituting herself, after having been twice warned not

to go, to the inconvenience and annoyance of the travellers at the dāk bungalow." *Held*, that the mere continuance of the petitioner in visiting the dāk bungalow did not constitute her act a public nuisance; if it were not so *per se*, it was not constituted a public nuisance by the circumstance that she had been warned not to go thither.

The petitioner has done no act which must necessarily cause annoyance to persons having occasion to use a public right. The traveller who alone was using his right as one of the public to frequent the bungalow, had invited the woman to visit him; at the time the act was committed, there was no other person using the right, nor was the act of such a nature that annoyance could be directly occasioned to persons who might subsequently use the bungalow.

Nuisances punishable under the Penal Code may still be made the subject of civil action, before or without prosecution (1 Bo. H. Ct. R., 2).

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
Summons.]

*269. Whoever unlawfully or *negligently* does any act (33) which is, *and which he knows*, or has reason to believe (26) to be likely to *spread the infection of any disease dangerous to life*, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

It is an indictable offence under the English law to expose a person having a contagious disease, such as small-pox, in public (Roscoe, 736).

Negligently, and which he knows.—It must be proved that the act was done negligently, with the knowledge or belief that it was likely to spread the infection of a disease dangerous to life, or that there was negligent dealing after inoculation with the above-mentioned knowledge or belief, otherwise it cannot be considered an offence under this section (2 Madras Jurist, 324).

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
Summons.]

*270. Whoever maliciously does any act (33) which is, *and which he knows*, or has reason to believe (26) to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

A, having an infectious disease, exposes himself with intent to spread infection. A is guilty under this Section 270.

B exposes A, a person with infectious disease on him, to excite charity. B is not guilty, malignant intention to spread infection being requisite to make him guilty under Section 270.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*271. Whoever knowingly disobeys any rule made and promulgated by the Government of India Disobedience to a quarantine rule. (16), or by any Government (17), for putting any vessel into a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*272. Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

A mixes oil and grease with ghee (a very common occurrence), thereby rendering it unwholesome by adulteration. A is guilty under this section. B mixes a kind of pea with gram (another very common occurrence), thereby rendering it noxious as food to horses, bringing on, in many instances, paralysis. B does this with intent to sell this adulterated gram as food for horses, or other animal. B is guilty under this Section 272.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*273. Whoever sells, or offers or exposes for sale, as

Sale of noxious food or drink. food or drink, any article which has been rendered, or has become noxious, or in a state *unfit for food or drink*, knowing or having reason to believe (26) that the same is *noxious as food or drink*, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Vide note under Section 265 as to a master's liability for the criminal acts of his servants as applied to charges under this section and Section 272, *ante*.

It is a nuisance, under the English law, for a common dealer in provisions to sell unwholesome food, or to mix noxious ingredients in the provisions which he sells (*Reg. v. Dixon*). And Taylor, at Section 150, says the *onus* of proving negligence rests with the complainant. It will not be inferred from the mere happening of an accident, unless the accident is one which does not usually happen in the ordinary course of things.

Unfit for food or drink—noxious as food or drink.—The preceding section dealt with adulteration of food or drink, this deals with the sale or attempted sale of such adulterated noxious articles, and not only such food or drink; this section is more comprehensive in its provisions, and includes food such as meat gone bad by being kept too long, or food such as meat which never was at any time fit for food, and drink that has gone bad by exposure, length of time it has been bottled, &c. There is no restriction in the wording of this section restricting the article of food or drink to articles for human consumption: it may be intended for the use of animal as well as man.

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*
[*Summons.*]

***274.** Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Summons.*]

*275. Whoever, knowing any drug or medical preparation to have been adulterated in such a manner *as to lessen its efficacy*, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person (11) not knowing of the adulteration, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

As to lessen its efficacy.—What is essential to be proved under this section to obtain a conviction is that the efficacy of the drug or preparation has been lessened, and that the accused was aware of this fact. The necessity for such a provision is obvious. The gist of the offence is in selling, or offering, or exposing for sale, or issuing from any dispensary, an adulterated drug as unadulterated.

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Summons.*]

*276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation *as a different drug* or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

As a different drug.—The difference between this and the two preceding sections is that no adulteration is contemplated or essential, for a conviction under this section, while under the former it is. The gist of the offence is in the fraud or false pretence of making the purchaser believe that he is using a medicine or drug which he is not using.

[*Any Mag.*]

[*Cog. Bailable.*
[*Summons.*]

*277. Whoever voluntarily (39) corrupts or fouls the

Fouling the water of a public spring or reservoir. water of *any public* (12) spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under provisions of Section 225, C. C. P.; also under Section 222, C. C. P.)

Any public.—For springs or reservoirs for *public use*, and to determine whether there has been a voluntary fouling, the purpose for which the water of such public spring or reservoir is ordinarily used must be taken into consideration.

[*Any Mag.*]

[*Uncog. Bailable.*
[*Summons.*]]

*278. Whoever voluntarily (39) vitiates the atmosphere in *any place*, so as to make it noxious to the health of persons (11) in general dwelling, or carrying on business in the neighbourhood, or passing along the public (12) way, shall be punished with fine which may extend to five hundred rupees. (*Triable summarily* under provisions of Section 225, C. C. P.; also under Section 222, C. C. P.)

Any place.—It is to be noted that the provisions of this section are not limited to “public ways.”

This section and Section 336 provide for the punishment of similar acts causing danger to human life and personal safety. It is not an essential of either of these sections that hurt be actually caused. See note under Section 336, *post*; also Sections 279 to 288 inclusive, 281 excepted, are all directed against acts which *may be* dangerous.

[*Any Mag.*]

[*Cog. Bailable.*
[*Summons.*]]

*279. Whoever drives any vehicle, or rides on any public (12) way in a manner so rash or negligent as to endanger human life (45), or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under provisions of Section 225, C. C. P.; also under Section 222, C. C. P.)

Rash driving or riding on a public way.

This section was framed because it was thought highly expedient to punish the offence herein defined, which is always dangerous and terrifying, irrespectively of actual mischief caused by it.

It may possibly be urged that the want of regard for human life is hardly capable of proof, except from the result. Such an argument is erroneous. A person driving in a crowded thoroughfare, urges his horses to such a speed that he cannot at will stop their course suddenly, a foot-passenger is run over, the driver is guilty of manslaughter. But suppose instead, that the foot-passenger is just saved by the timely effort of another person pulling him out of the way, "would such (say the Commissioners) a want of due regard for human life on the part of the driver be as justly inferred from the manner of his driving, proved as we may assume by the evidence of these two persons, the one who had been in imminent peril of his life, and the other who happily saved him, as if the result had been a fatal accident?"

By English law, furious driving or riding on the highway, so as to endanger persons passing, is a misdemeanour at common law, and in some cases, if injury occur, is a misdemeanour punishable with fine and imprisonment (4 Black. Com., 195).

Furious driving under the English law, considering the probable danger to the lives of the public, would seem to be an indictable offence at common law (*Williams v. E. I. Company*, 3 East, 192); and now 24 and 25 Vict., chap. 100, sec. 35, replacing the 1 Geo. IV., chap. 4, makes it a misdemeanour, and punishable with imprisonment for any term not exceeding two years, with or without hard labour (*Roscoe*, 517).

The following rulings in *Croft v. Alson*, 4 B. and Ald. 590; *Joel and Morrison*, 6 C. and P., 501; and *Shath v. Wilson*, 9 C. and P., 607, show how far a master will be liable for his servant's act. "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes out injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." Again, "if the servant, being on his master's business, took a detour to call upon a friend, the master will be responsible. If the servant lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible; or if the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable when the servant is acting in the course of his employment. If he was going out of the way against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." Again, "it is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of his coach-house, and with it commits an injury, the master has not entrusted his servant with the carriage. But whenever the master has

entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master in such a case will be liable, and the ground is, that he has put in the servant's power to mismanage the carriage by entrusting him with it" (S. M. and S., 80).

[M. of 1st or 2nd
Class.]

[Cog. Bailable.]
[Summons.]

*280. Whoever navigates any vessel (48) in a manner so rash or negligent as to endanger human life (45), or to be likely to cause hurt or injury (14) to any other person (11), shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Rash navigation of a
vessel.

The Sessions Court has jurisdiction to hear appeals from the sentences of a Justice of the Peace, acting under the Merchant Seamen's Act (Act 1 of 1859)—(William Martin Evans, &c., and 2 Mad. R., 473). See 17 and 18 Vict., chap. 104, sec. 267, regarding offences by masters, seamen, or apprentices employed on British ships. By "*offences*" are meant offences under the English law (*Queen v. Thompson*). For procedure, see 18 and 19 Vict., chap. 91, sec. 21; for jurisdiction in case of offences on board ships, see 12 and 13 Vict., chap. 96, and for its extension, see 23 and 24 Vict., chap. 88; for jurisdiction in case of offences by British subjects on board ships, see 30 and 31 Vict., chap. 124, sec. 2. The local tribunal in India appointed under Sections 201 and 202 of Act 1 of 1859, can suspend or cancel the British certificate of a master or mate, and for that purpose its report need not be confirmed by the local Government (1 Mad. R., 270).

[Ck. of S.]

[Cog. Bailable.]
[Warrant.]

*281. *Whoever exhibits* any false light, mark, or buoy, *intending, or knowing it to be likely,* that such exhibition *will mislead* any navigator, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, or with fine, or with both.

Exhibition of a false
light, mark, or buoy.

Whoever exhibits, &c.—It is not necessary that any one be misled by such light to bring the culprit under this section. The want of due regard for human life, upon which the criminality depends, is a matter of

inference from the circumstances, and whenever the circumstances proved are such, that if loss of life had ensued, the party committing the act would be answerable for it criminally, the same circumstances will sufficiently warrant a conviction of the simple offence where no injury has resulted:

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
{Summons.}]

*282. Whoever knowingly or negligently conveys, or causes to be conveyed, for hire, any person (11) by water in any vessel (48), when that vessel is in such a state, or so loaded, as to endanger the life of that person, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Trial summarily* under Section 222, C. C. P.)

Conveying person by
water for hire in a
vessel overloaded or
unsafe.

Plying for hire a boat which is out of order, and unfit to carry passengers, should be charged under this section and not under Section 336 (1 Bo. H. Ct. R., 13).

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
{Summons.}]

*283. Whoever, by doing any act (40), or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury (14) to any person (11) in any public way or public (12) line of navigation, shall be punished with fine which may extend to two hundred rupees. (*Trial summarily* under Section 222, C. C. P.)

Danger or obstruction
in a public way or
navigation.

A man is bound by law so to act with reference to his property, that it become not obstructive and injurious to the public, in any public way or line of navigation: these are the duties and liabilities attaching to property or charge of property for another.

"A question," says Mr. Mayne, "may often arise under this section as to the respective liabilities of the owner and the occupier of property. According to the doctrine both of criminal and civil law, the tenant is the person primarily liable, where the property in his occupation is a nuisance to others, either through an act or an omission on his part. In an old case the defendant was indicted for not repairing a house standing ruinous upon the highway and likely to fall. Just such a case is pointed out by this section. The verdict found that the defendant was a tenant-

at-will. The Court held that the statement that he was not bound to repair by reason of his holding was only an idle allegation; for it not only charged, but found that defendant was occupier, and as the danger is the matter that concerns the public, the public are to look to the occupier, and not to the estate, which is not material in such case to the public (*Reg. v. Watts*).

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.*
[*Summons.*]

* 284. Whoever does, with any poisonous substance, any negligent conduct with respect to any poisonous substances, act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

If it should so happen that a careless housekeeper should leave poisonous substances within reach of his khansamah among the ordinary bottles of wine and sauces, and thereby cause the guests to be poisoned "knowing or negligently omitting to take such order with any poisonous substance in his possession," &c., he would be criminally liable under this section; not so much because injury has been done by the act of the servant, for which he is responsible, but for his own criminal negligence committed by himself personally (S. M. and S., 95; see note under Section 301 *post*).

[*Any Mag.*]

[*Cog. Bailable.*
[*Summons.*]

* 285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life (45), or to be likely to cause hurt or injury (44) to any other person (11), or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to one thousand

rupees, or with both. (*Triable summarily* under provisions of Section 225, C. C. P. ; also under Section 222, C. C. P.)

Arson, *ab ardeudo*, is the malicious and wilful burning of the house or outhouse of another man. The English law distinguishes with much accuracy upon this crime as to the house which may be the subject of this offence—wherein the offence consists, or what amounts to burning of such a house, and how the offence is punished, each and all of which points are fully given by Blackstone in his Commentaries (iv, 249—253).

Or Injury.—*Held* that the word “injury” (rashly caused by fire, &c.) in this section, includes any harm illegally caused to the property of any other person, and is not confined to injury to the person only (Reg. v. Nathá Lalla ; 5 Bo. H. Ct. R., Part II, 67).

[*Any Mag.*]

[*Cog. Bailable.*]
[*Summons.*]

* 286. Whoever does, with any explosive substance, any
Negligent conduct act (33) so rashly or negligently as to en-
with respect to any danger human life (45), or to be likely to
explosive substance. cause hurt or injury (44) to any other
person (11), or knowingly or negligently omits to take such
order with any explosive substance in his possession as is
sufficient to guard against any probable danger to human
life from that substance, shall be punished with imprison-
ment of either description (53) for a term which may
extend to six months, or with fine which may extend to
one thousand rupees, or with both. (*Triable summarily*
under Section 225, C. C. P. ; also under Section 222,
C. C. P.)

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*]
[*Summons.*]

* 287. Whoever does, with any machinery, any act (33)
Negligent conduct so rashly or negligently as to endanger
with respect to any human life (45), or to be likely to cause
machinery in the pos- hurt or injury (44) to any other person
session or under the (11), or knowingly or negligently omits to
charge of the offender. take such order with any machinery in his possession or
under his care as is sufficient to guard against any probable
danger to human life from such machinery, shall be pun-
ished with imprisonment of either description (53) for a
term which may extend to six months, or with fine which

may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

The deceased had been in the defendants' factory; he had to stand constantly on a platform less than three feet wide between two large wheels, before which there was no fence; he was entangled, crushed, and died. For the plaintiff (deceased's widow) it was urged that the contravention of a clear statutory provision for the protection of their servants (7 & 8 Vic., c. 15, Sec. 21) made them responsible for the accident. For defendant it was urged that the deceased had contributed to the accident by voluntarily undertaking the duty, and therefore the maxim *volenti non fit injuria* was applicable. Verdict for the plaintiff. *Held*, "It was true that from the ordinary contract between master and servant there is no implied duty on the part of the former not to expose the latter to any extraordinary risk in the course of his employment, and also that in ordinary cases a workman voluntarily continuing to work in a position which he knows to be dangerous cannot recover damages if he receives injuries. But here the neglect of a clear statutory provision had caused the accident; therefore the deceased's previous knowledge of the danger became immaterial, and, consequently, the verdict was upheld (*Britton v. Great Western Cotton Company*, 7 M. J., 237); and again *in re Saxton v. Hawksworth* (26 L. T. Rep., N. S. 851, Ex. Ch.), where the plaintiff was a sheet roller in the service of defendants at their steel works, and had been so for three years. Five steam engines properly constructed were used in the factory. Some stood at a distance from the other, but two men only were employed to attend them all, as the plaintiff well knew. During the necessary absence of both the engine tenders, without negligence on their part, an engine "ran away," and caused a drum connected with it to fly to pieces, one of which, passing through a yard, entered the mill where the plaintiff worked, and hurt him. The "runaway" engine might have been stopped in time to prevent mischief if an attendant had been near it. *Held*, that the plaintiff being aware of the dangers incidental to his employment, contracted to take the risks, and therefore could not recover. The principles enunciated in these two rulings will, doubtless, be of assistance in guiding one to ascertain in cases coming under this Section 287 the liability of masters for accidents at their factories to those employed.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

* 288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life (45) from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description (53) for a term which may extend to six months,

Negligence with respect to pulling down or repairing buildings.

or with fine which may extend to one thousand rupees, or with both.

[Any Mag.]

[Cog. Bailable.]
[Summons.]

* 289. Whoever knowingly or negligently omits to take
Negligence with re- such order with any animal (47) in his
spect to any animal. possession as is sufficient to guard against
any probable danger to human life (45), or any probable
danger of grievous hurt (320) from such animal, shall be
punished with imprisonment of either description (53) for
a term which may extend to six months, or with fine which
may extend to one thousand rupees, or with both. (*Triable
summarily* under Section 225, C. C. P.; also under Section
222, C. C. P.)

This and the nine preceding sections relate to negligence "likely to cause hurt or injury to any person, or to cause probable danger to human life." It is therefore not necessary to show that hurt, injury or death had actually occurred before instituting proceedings under these sections.

The certainty of punishment, though it be small, for the acts or omissions dangerous to life, specified in these clauses, will be far more efficacious, we conceive (say the Law Commissioners), in restraining men from such acts, and preventing such omissions, than the distant apprehension of severe punishment *in the event of an accident resulting therefrom*, by which a life may be lost, or some serious injury suffered. The principle contained in these sections is given in the note to Section 281 *ante*.

A stable-keeper sending out his horses to exercise without a sufficient number of syces to look after them, would be liable under this section (S. M. & S., App. xii).

By the English law, consequential injuries may be sustained from a bull, ram, monkey, or other animal being left at large, or not properly taken care of, and the owner will in such case be liable to the party injured. The owner must, however, be shown *to have been aware of the mischievous propensities of the animal* before he can be made liable (on the principle that damage is not imputable to the intention or inadvertence on part of the owner; Aust. Jur. xxv, 496); and if the party injured have imprudently exposed himself, he cannot maintain an action (3 Black. Com., 129).

To sustain a charge under this section there should be evidence not only of negligence, but also that such negligence would probably lead to danger to human life or grievous hurt (Anonymous, 3 Mad. Rep., 33).

[Any Mag.]

[Cogn. Bailable.]
[Summons.]

* 290. Whoever commits a public nuisance (268) in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees. (*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

During an epidemic, natives are in the habit of hurriedly burying their dead, and subsequently digging them up again after the visitation has passed, either for more formal reinterment or for cremation. This practice undoubtedly amounts to an offence under Section 268, and is punishable under this section.

In a case of public nuisance under this Section 290, it must be proved that injury, danger, or annoyance have been caused, either in regard to the enjoyment of property, or the exercise of a public right, on the part of the portion of a community or of any particular class of people. The fact that there is a special law to meet a particular offence (in this case, cattle trespass) does not prevent the punishment of the offenders under the P. C., if an offence which could be rightly punished under the P. C. was established (9 W. R., 70).

The sentence of imprisonment passed in default of payment of a fine inflicted under this section should be simple, not rigorous imprisonment (5 B. H. Ct. R., Part II, 43).

The omission of a person to keep his ponies from straying is not a public nuisance under this section (6 W. R., 71).

[M. of 1st or 2nd
Class.][Cogn. Bailable.]
[Summons.]

* 291. Whoever repeats or continues a public nuisance (268), having been enjoined by any public servant (21) who has lawful authority to issue *such injunction* not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

Such injunction.—A general notice by advertisement to persons carrying on a noxious trade is not sufficient. Such persons should be directly informed, not only that their trade is noxious, but also that their business must be removed.

[*M. of 1st or 2nd
Class.*]

[*Cog. Bailable.*]
[*Warrant.*]

* 292. Whoever sells or distributes, imports or prints for sale or hire, or wilfully exhibits to public view, *any obscene* book, pamphlet, paper, drawing, painting, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine, or with both. (*Triable summarily* under Section 225, C. C. P., also under Section 222, C. C. P.)

Exception.—This section does not extend to any representation sculptured, engraved, painted, or otherwise represented, on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Vide Section 265 and note thereto, also Section 500 and note, *in re R. v. Almon* as to a master's liability for the criminal acts of his servants.

In *R. v. Hicklin* ("The Confessional Unmasked") it was decided that the fact that the book was of a controversial nature was no excuse for its containing indecent matter, if its inevitable tendency was injurious to public morality, and a person publishing such matters must be taken to have contemplated the natural results of his own acts. In *Steel v. Brannan*, Bovill, C. J., remarked: "The argument that the work was a report of legal proceedings was irrelevant. The privilege as to the publication of such proceedings existed in cases of libel, but had never yet been held to justify publications of an indecent character; since many indelicate facts were necessarily investigated in courts of law, which, if put forth in print, would greatly injure public morality.

Any obscene.—The term "obscene" is nowhere defined in the Penal Code, and is a term of a somewhat ambiguous meaning. The definition of the word, as given by Webster at page 902 of his Dictionary, is "Offensive to chastity and delicacy; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed; impure; as *obscene* language; *obscene* pictures." The ambiguity with which the term is surrounded arises from the difference that exists in the temperament and education of different individuals. Some people from their bringing up and antecedents see obscenity in the painting of the "Judgment of Paris." Others, who are generally considered by education to be endowed with more liberality and more refinement of mind, consider the picture a work of very high art. It may, perhaps, sometimes be difficult to draw a line between art and obscenity when the naked female figure is the artist's subject. The decision would probably rest on the degree in which the picture or the statue appealed to the

passions of the beholders; the decision would be far easier to come to with reference to a book, pamphlet, or paper. It is not a *sine qua non* in the composition of an obscene book that it should stimulate the lusts or the passions of a reader, *e.g.*, a book of filthy jests, or what with the slang of the day are called "dirty sells." These would not arouse any lustful feeling, yet they are decidedly *obscene*. With reference to books, pamphlets, papers, it would be a fair criterion I think to say that it is the "*spirit*" of the work which determines whether it is innocent or obscene.

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
[Warrant.]]

* 293. Whoever has in his possession any such obscene book or other thing as is mentioned in the last preceding section for the purpose of sale, distribution, or public exhibition, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine, or with both. (*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

Having in possession
obscene book for sale
or exhibition.

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
[Warrant.]]

* 294. Whoever sings, recites, or utters in or near any public place any obscene song, ballad, or words to the annoyance of others, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine, or with both. (*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

Obscene songs.

[*Any Mag.*]

[*Uncog. Bailable.*
[Summons.]]

294A. Whoever keeps any office or place for the purpose of drawing any lottery not authorized by Government, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Drawing lottery not
authorized by Govern-
ment.

[*Any Mag.*]

[*Uncog. Bailable.*
[Summons.]]

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything

for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees. (*Triable summarily* under Section 222, C. C. P.)

Section 13, Act XXVII of 1870. The following chapters of the Penal Code, namely IV (*general exceptions*), V (*of abetment*), and XXIII (*of attempts to commit offences*) shall apply to offences punished under this Section 294A.

Section 14, Act XXVII of 1870. No charge of an offence punishable under this Section 294A shall be entertained by any Court unless the prosecution be instituted by order of, or under authority from, the Local Government.

This section was added to the Code by Mr. Stephens' Bill, Act XXVII of 1870, Section 10, and is founded on Act V of 1844. By Statute 10 and 11 Wm. III., chap. 17, all lotteries are declared to be public nuisances, and all grants, patents, and licences for the same to be contrary to law. But as State lotteries for many years found a ready mode of raising the supplies, an Act was made, 19 Geo. III., chap. 21, to license and regulate the keepers of such lottery offices; they were however suppressed altogether by Statute 4 Geo. IV., chap. 60. Acts XXI of 1857 and III of 1867 deal with gambling in the public streets and in gaming-houses, and keepers of gaming-houses; and Section 12 of the Punjab Laws Bill, 1871, provides a penalty for persons of full age gambling with minors. For the definition of common gaming-house see Section 1, Act III of 1867, and also notes to Section 268 *ante*.

The sanction of the Local Government is necessary before a charge for keeping a lottery office under this section can be instituted (*Government v. Ngo Cho*, 15 W. R., 2).

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

The principle on which this Chapter has been framed is this, "that every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another."

Section 5, Act VI of 1864 provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment, but whipping may be inflicted for *first or any other* offence, and is to be administered in the way of school discipline, with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death*, or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

[M. of 1st Class.]

[Cog. Bailable.]
[Summons.]

295. Whoever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons, *with the intention of thereby insulting* the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

With the intention of insulting.—A and B, a man and woman who had an intrigue together, entered a half-ruined Mosque, for the purpose of using it as a shelter to carry out their copulation; they were seen by a policeman, and sent up for trial under this section. The conviction under this section could not hold, for their intention to insult religion is an essential part of their offence, and from the surrounding circumstances of this case, their intention was clearly to have carnal intercourse, and not to insult the religion of any class of persons. Even the destruction or damage done to a place of worship must be done with intent to insult the religion of some class, and not merely be an act of mischief, to bring it within the provisions of this section.

[*M. of 1st or 2nd
Class.*]

[*Cog. Bailable.*]
[*Summons.*]

* 296. Whoever voluntarily (39) causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment of either description (50) for a term which may extend to one year, or with fine, or with both.

Disturbing a religious assembly.

Under this section proof of intention is unnecessary, as the Act supposes an intention to insult, if the disturbance, in fact, follow immediately as the result of the offender's act. A person causing disturbance when he causes it by means whereby he intended to cause it, or by means which he knows to be likely to cause it, is punishable by this section; and assemblies lawfully engaged in the performance of religious worship or religious ceremonies are hereby protected from voluntary disturbance and insult, be that religion true or false; insulting persons engaged in ceremonies deemed by the disturber as absurd and erroneous, is equally penal with insulting persons engaged in ceremonies deemed by him to be sound and true: as long as the former are acting lawfully by the provisions of this chapter, no one is allowed voluntarily and intentionally to insult the religion of another.

[*M. of 1st or 2nd
Class.*]

[*Cog. Bailable.*]
[*Summons.*]

* 297. Whoever with the intention of wounding the feelings of any person (11), or of insulting the religion of any person or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits *any trespass* in any place of worship, or any place of sepulture, or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description (53), for a term which may extend to one year, or with fine, or with both.

Trespassing on burial places.

Any trespass.—The offence of "Criminal trespass" is defined by Section 441 *post*, but the word "trespass" here referred to is not merely "criminal trespass" as there defined, but an ordinary act of trespass with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is

likely to be insulted thereby. By trespass is meant "an entry on another's land without lawful authority."

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

*298. Whoever, with the deliberate intention of wounding the religious feelings of any person, (11) utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Uttering words, &c.,
with deliberate intent
to wound the religious
feelings of any person.

In framing this clause we had two objects in view; we wished to allow all fair latitude to religious discussion, at the same time to prevent professors of any religion from offering, under pretext of such discussion, intentional insult to what is held sacred by others. No person is justified in wounding with deliberate intention, religious feelings of his neighbours by words, gesture, or exhibitions. An argument urged by a person, not for purpose of insulting professors of a different creed, but in good faith for vindicating his own, will not fall under definition contained in this clause (Law Commissioners' Report, Note 7, 97).

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

Of Offences Affecting Life.

The right of personal security consists in a person's legal and uninterrupted enjoyment of his *life*, his *limbs*, his *body*, his *health*, and his *reputation*. Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or to do any other illegal act; these, though accompanied with all other requisite solemnities, may be afterwards

avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of non-compliance. The same is also a sufficient excuse for commission of many misdemeanors. The constraint a man is under in these circumstances is called in law *duress*, of which there are two sorts: *duress* of imprisonment, where a man actually loses his liberty; and *duress per minas*, where the hardship is only threatened and impending.

Duress per minas is either for fear of loss of life, or else for fear of mayhem, or loss of limb. A fear of battery or being beaten, though never so well grounded, is no *duress*, neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by receiving equivalent damages (1 Black. Com., 116-118). By the English law, according to the principle contained in the maxim "*Necessitas inducit privilegium quoad jura privata*," where one man attacks another, and the latter without fighting flies, and after retreating as far as he safely can, until no other means of escape remain to him; turns round and kills his assailant: this homicide is excusable as having been committed in self-defence. The distinction between this kind of homicide and manslaughter being that here the slayer could not otherwise escape although he would, in manslaughter he would not escape if he could. The same rule extends to the principal civil and natural relations of life; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused, the act of the relation existing being construed the same as the act of the party himself. Necessity privileges only *quoad jura privata*; protection is not allowed in the case of a wife, if the crime be *malum in se*, and prohibited by law of nature, or heinous in character and dangerous in its consequences. If a married woman be guilty of treason, or murder, or offences of like description in company with or coercion of her husband, she is punishable as if she were sole. So if a man be violently assaulted, has no other possible means of escaping death than killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent man (B. L. M., 16-18).

According to the authorities, if a man unlawfully inflicts a dangerous wound on another, and the wounded person after being treated by qualified practitioners, applying themselves to the best of their ability to the case, dies of the wound, the man inflicting it is guilty of murder, even though an erroneous treatment of the case by the practitioner was the immediate cause of death. This is the rule, but with all its apparent precision its language is seen on close examination to be ambiguous. But the *dicta* of the older authorities appear to require some modification to bring them into conformity with the alterations which have been made in the English Statute Law. Till about half-a-dozen years ago an attempt to murder and an actual murder were both capital offences; but at that time the Legislature, departing from the sound rule of looking only to the quality of the act as attempted by the criminal, made the punishment differ according to the accident of the result, so that a man who attempts a murder but fails of success does not now commit a capital offence. It is easy to

see how this modification might be made use of by a prisoner's counsel. It might be urged that an attempt, however deliberate, is not a capital offence unless it be consummated, that it becomes most important to inquire into the skill of the treatment applied to any case, because, if life could have been saved, the offence would have ceased to be capital. *Vide* Whiteside, C. J., remarks in *re R. v. Kelly*, given under *Explanation 2 to Section 299 ante*; and for a fuller exposition of this argument see *Times* of the 13th November, 1871, from which the above remarks are taken. Compare also the English Statute Law with Section 299 and Explanations. Under *Explanation 2* no ignorance and negligence on the part of the unfortunate victim gives a particle of shelter to the accused; and the law in Ireland, as stated by Whiteside, C. J., is the same on this point, viz., "that he who inflicts a dangerous wound is responsible for the consequences."

"The Hindustanee usually strikes with the sword (*talwar*) or iron bound cudgel (*lohar ki lattee* or *lohbanda*). The Bengali's readiest weapons are the *dhao* (bill-hook), or *kooralee* (axe), and the bamboo (*bans ki lattee*). As would be expected in a rocky country like Chota Nagpore, heavy stones are frequently used as instruments of destruction, just as opium poisoning is most prevalent in opium districts. Within doors the Bengali moved by sudden homicidal rage readily takes up the *dhao* (bill-hook), *bhuttee* (knife fixed in stand at right angles for cutting fish and vegetables) or *peerah* (wooden stool). In the field, either a bamboo, a sickle (*hussoa* or *kachtya*) a *durmush* or *moogur* (hammer for breaking clods), or a hoe (*kodalee*) generally is at hand. Sexual jealousy is probably the most frequent cause of homicide among Mussulmans; criminal abortion and child murder are rife among the unhappy class of Hindoo widows. There is no very marked distinction in the characteristics of crimes as practised in Bengal, Bombay, Madras, the North West Provinces, and the Punjab" (Chev., M. J. for I., p. 10). An altogether new crime is probably never committed in India, every criminal act being founded upon recent practice or old tradition, and another fact of great practical importance to the Indian jurist is, as it has been lately well put, "there is but one step from the popular belief in the prevalence of any stated crime to the fact of its occasional perpetration among the people" (*Ib.*, pp. 12, 13).

Section 5, Act VI of 1864 provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences marked * in this chapter. Juveniles may be punished with whipping only in lieu of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No female, nor any person sentenced to *death* or *penal servitude*, or imprisonment of *more than five years*, shall be whipped (Section 7, Act VI of 1864).

299. Whoever causes death (44) by doing an act (33) with the intention of causing death, or
Culpable homicide. with the intention of causing such bodily injury as is likely to cause death, or with the knowledge

that he is likely by such act to cause death, commits the offence of culpable homicide.

Vide note 3, and compare with Section 97, 99, and 104 P. C.

Where a degree of violence was used, which ordinarily would not cause death, but which by rupturing a diseased internal organ did cause death, it was held that the prisoner could not be convicted of culpable homicide, excessive violence not being shown, nor that he had any knowledge of disease referred to (1 R. C. C. R., 77. See Explanation 1 *post*).

By English law, swearing away a man's life by perjury is not murder, Section 194 *ante*, would meet such a case. See the Illustration under that section; and at p. 76 of the original Code the following illustration was given :—

“A, with the intention or knowledge aforesaid, falsely deposes before a Court of Justice that he saw Z commit a capital crime. Z is convicted and executed in consequence. A has committed the offence of voluntary culpable homicide.”

If a person is present, and actively engaged in causing the death of another, he is guilty as a principal, though he may not have struck the fatal blow (*Queen v. Jan Mahomed*). It is not absolutely necessary that the body of the deceased should be found in order to prove that he had been killed (*Queen v. Gobind Badgee*). Lord Hale has laid down a rule which has met with general approbation: “I would never,” says he, “convict any person of murder or manslaughter unless the fact was proved to be done, or at least the body found dead.” And Mr. Starkie states it to be an established rule that upon charges of homicide the accused shall not be convicted, unless death be first distinctly proved, *either by direct evidence of the fact, or by the inspection of the body*. To constitute culpable homicide, three essentials are required: 1st, the act must be done with the intention of causing the death; 2nd, or of causing such bodily injury as was likely to cause death; 3rd, or with the knowledge that the act was likely to cause death. By Section 149 *ante*, if murder is committed by any member of an unlawful assembly in prosecution of their common object, then all the members are liable. When intention or knowledge is proved, the absence of motive or want of premeditation will not reduce the offence. For the distinction between culpable homicide amounting to murder and not amounting to murder (see 5 W. R. C. R., 45). This Section 299 has no mention in its provisions as to “illegal omissions,” nevertheless this section read with Section 32 *ante* provides for illegal omissions and their consequences: *e.g.*, A, a policeman placed by authority near a bridge carried away by floods, omits to tell B that by proceeding in the dark he will probably be killed. B falls over the bridge and is killed. A is guilty of murder under Sections 32 and 299, P. C. But every improper omission is not necessarily punishable as illegal.

Vide note under Section 32 *ante*, with reference to illegal omissions.

Where the accused, whose property had frequently been stolen, went out with a *lattee* to watch his property, and with a *lattee* struck a thief, who died from the effect of the blows, it was held that the case did not fall within the fourth exception to Section 99, P. C., and that the prisoner was not guilty of culpable homicide not amounting to murder, but was protected by Sections 97 and 104, P. C., and had not exceeded the legal right of private defence of property (12 W. R., 15. *Queen v. Mokee*).

Reg. v. Iman and others. Charge murder. *Held* that the English practice should be followed as to the amount of corroboration required to support the evidence of an accomplice, which is that, when he speaks as to two or more persons having been concerned in the same offence, his testimony should be confirmed, not only as to the circumstances of the case, but also as to the identity of the prisoners; and that any prisoner as to whom his testimony is not supported should be acquitted (3 H. Ct. Bombay, Reports of Cases, Part III, 57, dated April 15th, 1867).

Homicide not felonious may be divided into three classes :

1. Justifiable homicide.
2. Excusable homicide.
3. Homicide by misadventure.

For a full investigation and report on the above, see 1 East P. C., 219, 221. *Roscoe*, 555.

In ancient days, when the infliction of punishment on the offender was left to the offended, and in cases of murder to the relatives of the dead, it was the duty of every male, and obviously his interest, to award to others that protection which he might one day need for himself. Especially in the case of accidental or justifiable homicide was this private protection necessary to the slayer, and took the place occupied amongst the Jews by their cities of refuge. And when the case was such as could be tried at law it was only by private protection that the accused was preserved from his accuser until the matter could be legally decided. But this duty lost its weight as civilization advanced; and at the present day a suppliant for protection or justice must go to the law.

It is a *presumptio juris*, founded partly on the principle that every person must be taken to intend that which is the immediate and natural consequence of his deliberate acts, but deriving additional force from considerations of public policy, that, where the fact of slaying has been proved, malice must be intended, and that all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him. But it may be made a question whether this presumption holds in a case of suicide, where the only fact established before a Coroner's Jury is, that the deceased terminated his own existence, and there is no evidence as to the state of his mind at the time (see *Borradaile v. Hunter*). It is submitted that the presumption does not apply to such a case, and for the following reasons :—

- 1stly. The presumption of malice is only a rebuttable presumption,

adopted on the ground that to call on a *living* person to justify a homicide may be advisable in public policy, and can work no hardship to the accused—an argument wholly inapplicable to the case of a person who, being no more, cannot be called on to justify or explain anything.

2ndly. Presumptions ought to be based on what most usually and generally exists. In any, probably most cases of suicide, mental alienation in some or other form is present; in murder it is quite otherwise.

3rdly. The man who commits murder has only moral and religious feelings to subdue; he who destroys himself has also to struggle against the primary law of nature—self-preservation.

4thly and lastly, there seems no good reason why the law should in this case lose sight of its own maxim, "*Nemo præsuntur esse immemor æternæ suæ salutis et maxime in articulo mortis*" (Best P. L. and F., 177).

Illustrations.

(a.) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b.) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause, Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide.

(c.) A, by shooting at a towel with intent to kill and steal it, kills B, who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

The English law, no more than the Indian Penal Code, recognizes that a mere acceleration of death is not murder. In *R. v. Ramsay*, Ros. Cr. Ev., the law is thus stated:—"However feeble the deceased may have been, however short his tenure of life, it is equally murder as if the person killed had been in the prime of youth and vigour." And in *Hales P. C.* 431, it is laid down, "that if a man have a disease which would in a short time terminate his life, and another by a wound or thrust hasten his death, such a killing constitutes murder." But it must be borne in mind that no mental aggravations of disease, when no physical injury is inflicted, come within this explanation: *e.g.*, in a sudden riot A is attacked by a number of the rioters, and B, from fear, or other strong mental emotion, such as rage or passion, falls down dead, having burst the walls of his heart, the assailants cannot be charged with the murder

of B, though if B had been struck and the blow had caused the rupture of the walls of the heart, B having heart disease, of which he might probably have died any day, then the assailants would come under this Explanation (1, Section 299).

The death must be accelerated by some injury, and the disease under which deceased was labouring must not have been the sole cause of his death: *e.g.*, A has cholera, of which there is no doubt he must have died in the end. B so doses him that his death is accelerated, and A dies a day or so, or a few hours, the sooner by the aggravation of the disease from overdosing. B has caused A's death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although, by resorting to *proper remedies* and skilful treatment, the death might have been prevented.

A wounds B; the bodily injury thus inflicted brings on fever, which fever might have been allayed, and death prevented, had A resorted to proper remedies or to the neighbouring medical practitioner for treatment. B dies from fever brought on and caused by the wound. The bodily injury inflicted by A was the cause of B's death, for the fever was the immediate effect of the primary cause, the wound, and death the effect of the fever. A has here caused B's death. (See 1 Hale, 428.)

The principle involved is, that the accused's act is the cause of death, and the plea of his victim's ignorance, or negligence, cannot be allowed to shelter him—the words "*proper remedies*" are used in this explanation. The rule does not apply where improper remedies have been applied to the wound—and the rule by English law, to make the killing murder, the death must occur within a year and a day from the date of the infliction of the wound. In such cases malice is a necessary ingredient. In reference to such cases as would come under this Explanation 2, Roscoe gives the following as an illustration of the difference between *negligence* and *malpractice*:—"If the death was evidently occasioned by grossly erroneous medical treatment, the original author will not be answerable; but if it was occasioned from want merely of the higher skill which can only be commanded in great towns, he will be answerable, because he has wilfully exposed the deceased to a risk from which he has practically no means of escaping." For a fuller treatment of this subject see 4 Madras Jurist, 232. *In re R. v. Kelly*, for shooting Talbot, Whiteside, C. J. said:—"The prisoner at the bar proposed to establish as a defence to the accusation made against him, that the death was caused, not by the wound itself, but by the treatment which the deceased received at the Richmond Hospital. The law is this—that he who inflicts a dangerous wound is responsible for the consequences; that, according to the ordinary course of life, its difficulties and the occurrences which reasonably and commonly take place, where wounds are inflicted and death is the result of a wound so given, the law

we declare to you is this—that whether the death was caused mediately or immediately; whether immediately by the prisoner, as being the immediate and instant result of the wound, or mediately by medical treatment, the prisoner is still guilty of murder, and the law treats him as the slayer of the dead; if the treatment he receives is applied by surgeons of generally competent skill, and *bonâ fide* by them with a view to effect the recovery of the man—and the law involves this proposition which you are to take from me as governing this trial—that, even although the death had been mediately caused by the mistake of the surgeon in the treatment he adopted, or by the unskilfulness of his act in applying that treatment, it does not absolve the person who inflicted the dangerous wound of the guilt of wilful murder, and he is responsible for the death as the doer of that death, although the medium by which death may have been immediately caused comprises a mistaken treatment or an unskilful operation. That is the law of the land.” His Lordship added:—“This was a case of gunshot-wound. It might have happened, and perhaps it did happen up to a few years ago, that in the whole generation of existing surgeons there may not have been a single surgeon who had ever treated in the living subject a case of gunshot-wound. But surgery, like any other science, knowledge, or art, is to be learned from those who have had experience, and from persons who lived in generations when more active injuries were produced, and who have left behind them the means of letting it be known what course should be followed in cases of the kind. It would be an awful thing that if there was only one man in Ireland—such as Dr. Baxter, who had a very large experience—possessed of that species of skill, there should be no responsibility resting upon any one who inflicts that species of wound, unless such a surgeon is found out and applied to. Mankind are so dependent upon external assistance, that a man who is in any way afflicted must only resort to the best assistance he can find. If there be found in an hospital long established men of high education, large qualifications, and some of them in the practice of surgery of long experience, the patient must submit himself to the application of the best skill he can find; and if that skill is honestly and *bonâ fide* applied for the purpose of obtaining his recovery, if he dies under the treatment which is mistakably determined—in the ordinary transactions of life mistakes must be looked for—he who inflicts the wound is still responsible for that casualty, that misfortune of the wound not having been treated with perfect skill, but being treated with all the skill that can reasonably be provided for such a matter under such circumstances. That is the way the law is.”

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide; but it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

To cause the death of a living child, “*en ventre sa mère*,” is not to “cause death” within the meaning of Section 299; this, though not murder, was by ancient law homicide. Bodily injury to a child while in

the mother's womb can be punished under Sections 315 and 316, *post*; but if any part of the child has been brought forth, to cause its death may amount to culpable homicide under Section 299, Explanation 3. The wording of this explanation, though somewhat doubtful, and by no means so clear as it might be, does away in a measure with a difficulty surrounding the English law on the subject, for it looks upon the life of the child, as long as no part of it has been brought forth, as a part of the mother's life, and not as having an existence independent of its mother.

300. Except in cases hereinafter mentioned, culpable homicide is murder, if the act (33) by which the death (46) is caused is done with the intention of causing death, or—

Murder.

In re Queen v. Sheikh Bazee, &c., 7 W. R., 47, Full Bench. *Held*, culpable homicide is not murder, unless the case comes expressly within the provisions of clauses 1, 2, 3, or 4 of the following Section 300, P. C. Under Section 299, an offence may amount only to culpable homicide, not murder, although none of the exceptions specified in Section 300 are applicable to the case. An express finding by the Session Judge, that the case does not fall under any of the clauses of Section 300, is tantamount to an acquittal of murder. There had been a riot and fight between two factories, and some members of one party (A) were charged with the murder of the leader of the other party (B), and some members of the other party (B) were charged with causing grievous hurt to the leader of (A). *Held*, that the members of each party should have been committed for trial separately, and the Magistrate was wrong in committing members of party (A) and of party (B) for trial all together upon joint charges as if they had had one common object.

Secondly. If it is done with intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly. If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Certain snake-charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite three of these persons died. *Held* by Norman, J., and E. Jackson, J., that the offence was murder under clauses 2 and 3, Section 300, P. C., unless it could be brought within the fifth exception to that section. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide

not amounting to murder (3 B. L. R., Part XIV, 25; *Queen v. Panai Fateama*, &c.).

Fourthly. If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

This agrees with the English law. Many of the writers on English Criminal Law instance the case of a man riding a horse amongst a crowd knowing the horse to be a kicker; although the rider does it for diversion, yet if any one is killed by the kick from his horse, he is guilty of murder, and East and Hale both instance a case similar to illustration (d) to this exception.

When a Judge convicts on the charge of culpable homicide not amounting to murder, he should record under which of the exceptions in Section 300, P. C., the case falls (*Government v. Kalika Misser*, H. Ct., N. W. P., 3rd July, 1866).

When a poisonous drug was administered to a woman to procure miscarriage, and death resulted, and it was not proved that the accused knew that the drug would be likely to cause death, &c., they were acquitted by the High Court of murder, and convicted under Section 314, P. C. (10 W. R., 59, *Queen v. Kālachand Gopee*, &c.).

Illustrations.

(a.) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b.) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(c.) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d.) A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake, or accident.

Exception 1.—In an article in the *Madras Jurist* of the 2nd August, 1869, the subject of this section will be found fully discussed. The writer points out how the English law and the words of this exception point to the same conclusion. "Deprived of the power of self-control by grave and sudden provocation" is the phrase. That the provocation should be such as to throw the mind of the accused off its usual balance is essential, and on this turns the distinction between offences. Few matters can come before a jury, if any, of equal importance with the distinguishing between the offences of murder and manslaughter. This section of the Code and this exception are clear enough; the difficulty lies in drawing that line which may be faint, but must be accurate, between the two degrees of homicide. (*Vide* note (2) under Section 302.)

The above exception is subject to the following provisos :—

First. That the provocation is not sought, or voluntarily provoked, by the offender as an excuse for killing or doing harm to any person.

The act must necessarily proceed from unsought or involuntarily excited provocation, if the offender is not so deprived of self-control, his act will amount to murder: *e. g.*, A having previously deliberately designed to get B to give him some insult or other provocation, as a veil or plea for his act, and on receiving the sought-for provocation, he kills B, this exception will not hold him guiltless of murder. (See Illustration (f).)

Secondly. That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

The wording of this proviso does not limit its provision to public servants only, but includes all persons acting according to the commands of the law (see Section 79, *ante*). A, not a public servant, but acting in obedience to the law, tries to apprehend B. B used violence towards A to escape apprehension. A, in self-defence, strikes B, which so incenses B that he draws a dagger and kills A. B will not be covered by the provisions of this exception. (See Illustration (c).)

Thirdly. That the provocation is not given by anything done in lawful exercise of the right of private defence.

Compare Illustration (e), *post*, and Sections 99 and 100, *ante*.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

Illustrations.

(a.) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b.) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c.) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his power.

(d.) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e.) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f.) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without pre-meditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

With reference to the provisions of this exception, the Law Commissioners give the following reason for making a separation between murder and culpable homicide in self-defence:—"The chief reason," they say, is because "the law invites men to the very verge of the crime which they have designated as culpable homicide in defence. It prohibits such homicide. But it authorizes acts which lie very near to such homicide." . . .

And further, because "the line between those aggressions which it is lawful to repel by killing, and those which it is not lawful so to repel, is and must be to a great extent an arbitrary line, and many individual cases will fall on one side of that line, which, if they had framed the law with a view to those cases alone, they would have placed on the other side of the line." A enters B's house without B's consent, and when called on to leave he refuses to do so. B takes him by the neck and tries to forcibly eject him. A resists and throws B on his head. B dies. A's act is not extenuated by the provisions of this section, for his acts were wholly illegal. But supposing B, getting incensed by A's resistance, shoots A, the offence would, under the provisions of this exception, be culpable homicide not amounting to murder.

To kill wrongfully is to kill without right ; consequently, a person who kills a thief was not liable to the action *damni injuria*, that is, if he could not otherwise avoid the danger with which he was threatened (4 L. I. B. ; 3 T. I. T., San. N. I. J., 513).

Illustration.

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he in good faith believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

This section gives protection so long as a person acts in good faith, but if his act is illegal and unauthorized by law, or glaringly exceeds the powers entrusted to him by law, under the cloak of authority, he loses the protection here afforded him. A, a policeman, forces open the door of a house in which he has reason to believe thieves are distributing their stolen wealth ; the greater number of the thieves escape over the wall, leaving one old man behind, unable to get away ; the policeman knocks down the old man B with his baton—if it should be held that in respect of this act A had exceeded his powers and had committed culpable homicide, this exception extenuates his offence and prevents its amounting to murder. Or again, A, a police sentry over a jail, fires at B, a prisoner trying to escape. If A had exceeded his powers, this exception would extend to him.

Exception 4.—Culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the

heat of passion upon a sudden quarrel, and without the offender having taken undue advantage, or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

The words *without premeditation* are the gist of the matter in this exception, and another point to be noticed as an extenuation is, the accused having taken *no undue advantage*. Blackstone tells us, that where on a sudden provocation one beats another in a cruel and unusual manner, so that he dies, it is murder—*e. g.*, where a schoolmaster corrected his pupil with an iron bar, and the pupil died, the master was held guilty of murder, and the nature of the fatal weapon gave clear evidence of the intent (4 M. J., 274). No words, however abusive, however insulting, can reduce the crime of murder to manslaughter. When a person produces by violence the death of another, that is *prima facie* murder, and no abusive words, however offensive, will reduce the offence to manslaughter. It is true that in the language of the law murder is always a crime committed of malice aforethought, but that requires this explanation: it does not mean that the crime should have been premeditated; it does not mean that it should have been designed and planned long before. It is no less a case of murder because it is an act instantaneously resolved; and it is not a matter which will reduce the offence from murder to manslaughter that the awful consequences that may result were not intended by the prisoner (*R. v. Diblanc*; the *Park Lane murder*, 1872).

An unpremeditated assault (ending in an affray in which death is caused) committed in the heat of passion upon a sudden quarrel (it being immaterial which party offered the provocation or committed the first assault), was held to come within Exception 4 of Section 300 (1 W. R., 33; *Queen v. Salim Rai*).

Causing such bodily injury as a prisoner knew to have been likely to have caused death, is murder; the want of *intention* to cause death does not reduce culpable homicide to culpable homicide not amounting to murder (*Queen v. Pooshoo*, 14th December, 1865, 1 R. C. C. R., 7).

Exception 5.—Culpable homicide is not murder when the person whose death is caused being above the age of eighteen years, suffers death, or takes the risk of death, with his own consent.

Illustration.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of B's youth, he was incapable of giving consent to his own death. A has therefore abetted murder.

The punishment for the case given in the illustration to this section is punished by Section 305 *post*. With reference to who above the age of

eighteen may lawfully consent to suffer, see Section 87 *ante*; as to the nature of consent requisite, see Section 90 *ante*).

In the night one Sheobux, husband of Musst Muhrani, died, and she did not express the intention of being Suttee until the morning. In the morning she expressed the intention, and the other accused collected the materials for burning the accused Musst Muhrani. Some of the accused brought fuel, some brought bracelets, and such like, and one Ramgolam performed poojah. The woman was stopped by the police from carrying out her intention. The accused were tried by the Magistrate under Sections 309 and 109, and 309, I. P. C., convicted and sentenced, the principal to four months, the abettors to one month severally. On this case the J. C. O. passed the following opinion:—"It appears to me that Suttee comes within Exception 5, Section 300, I. P. C., and is culpable homicide not amounting to murder. Those who instigate the commission of this offence are liable as abettors, whether the act abetted be committed or not (Ex. 2, Sec. 108, I. P. C.), to the penalties prescribed for abetment of culpable homicide, and thus under Section 115 would be liable to seven years' imprisonment:" *e.g.*, Z, a Hindu widow, consents to be burned with the corpse of her husband. A kindles the pile, B, C, and D are present, aiding the Suttee. In the event of Z being burned to death, if Z is above the age of eighteen, A has committed culpable homicide not amounting to murder, and B, C, and D have abetted that offence: but if Z is under eighteen, A has committed murder, and B, C, and D abetment of murder (*vide* Section 300, Exception 5). In the event of being rescued before sustaining any hurt, A would be guilty of attempt to commit culpable homicide not amounting to murder, or murder, as the case may be, and B, C, and D to abetment of that attempt.

301. If a person (11), by doing anything which he intends or knows to be likely to cause death (46), commits culpable homicide (299) by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Culpable homicide by causing the death of a person other than the person whose death was intended.

The law in England on this point is similar to this, and the main principle underlying both the common law of England and the provisions of the Penal Code is, that a wrongdoer must answer for the consequences of his acts, even when he has no apparent hate of individuals. Hale lays it down, that where an injury intended to be inflicted upon A, by poison, blows, or other means of death, would, had he sustained it, have been murder; it will amount to the same offence if B, by accident, happens to lose his life by it. But, on the other hand, if the blow intended for A

arose from a sudden transport of fury, which, in case A died by it, would be manslaughter, the fact will admit of the same alleviation if B should happen to fall by the blow.

A woman intending to murder her husband, made three cakes for his dinner, into two of which she put datura poison, the third she made as usual, and placed in it no poison. Previous to her husband's return, two small children came to her house, and she to please them gave them a piece of, as she thought, the cake without poison in, but by mistake a piece of the poisonous cake; the children died; she was tried and convicted under this Section 301. *Query*, was such conviction good? or were not the two acts wholly separate and distinct? Had the children of their own accord taken of these cakes, and death ensued without her knowledge, she would of course have come under this section; but under the above circumstances, it is not tenable to argue that there were two acts done by the accused, that of making the cakes and that of introducing the poison; the cake she made without the poison was not intended to cause death, nor can it be said that she knew that the consumption of that cake was likely to cause death: this act was not capable of causing death in the natural and ordinary course of events.

[*Cog. Not bailable.*]
[*Warrant.*]

[*Ct. of S.*]

302. Whoever commits murder shall be punished with death or transportation for life (53), and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Punishment for murder.

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such government for the periods specified in their respective sentences, of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence, provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

By Foreign Department, No. 31 P., certain Regulations for the Peace and Government of the Districts of Hazara, Peshawar, Kohat, Bunnoo, Dera Ismail Khan, and Dera Ghazee Khan, approved by His Excellency the Governor-General in Council, and published as having the force of law, under 33 Vic., c. 3, s. 1, page 5 of the *Gazette of India*, of 2nd January, 1872. Regulation 6 runs as follows:—"When a person is accused of murder or other heinous offence, and the case appears to the Deputy Commissioner to be one which, from the inadequacy of evidence or other cause, it is not expedient to try according to the ordinary procedures, the Deputy Commissioner may cause the case to be referred to the decision of

Elders, convened according to Pathan or Bilooch usage, and cause such decision to be carried into effect, as if it were a sentence of Court: provided such sentence shall extend only to the infliction of a fine on the convicted party."

If there was sufficient evidence to hang or transport the accused, the case would not, I presume, be transferred to a Panchayet, but by Mahomedan law a man who kills another is liable to pay the price of blood, and it appears that this reference to Panchayet is to determine the price so payable.

Culpable homicide, though committed under provocation, will amount to murder, unless it is proved, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his action, but that that feeling had an adequate cause (4 B. L. R., Part V, 2).

In cases where females are sentenced to death in India, it is customary to call for the opinion of the civil surgeon as to whether they are quick with child or not—apart from any plea of pregnancy. The practice of assembling Juries of matrons was long prevalent in India. In the case of Peggy in Calcutta, in 1777, it was decided by the Court, that as a Christian the woman was entitled to a Jury of Christian women. They returned their verdict that she was not in child, she was accordingly executed. This unnatural practice came to an end in the case of Mukawa in 1836, *in re* Queen v. Mussamut Ghurburnee. The sentence of death passed upon her was ordered not to be carried out till such time after her delivery as was usual in such cases. A few months later it was ruled, *in re* Queen v. Seppoo, that "a woman being quick with child, is exempt from capital punishment" (Chev., M. J., pp. 710, 712). Only the other day in England, a Jury of matrons was empanelled *in re* R. v. Edmunds.

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

303. Whoever being under sentence of transportation for life commits murder (300), shall be punished with death. (*Information compulsory, vide* Section 89, C. C. P.)

Punishment for murder by a life convict.

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*304. Whoever commits culpable homicide (299) not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to a fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily

Punishment for culpable homicide not amounting to murder.

injury as is likely to cause death ; or with imprisonment

Ct. of S.]

[Cog. Not bailable.]
[Warrant.]

of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury (44) as is likely to cause death (46). (*Information compulsory, vide* Section 89, C. C. P.)

Hanging a man, life not being extinct, to a tree, after he has been knocked down by a blow from *one* of the party, would render *all* liable to a conviction for culpable homicide amounting to murder. If life were extinct before the hanging, the striker would be liable to indictment under Section 304 or 325, P. C., and the prisoners who assisted in the hanging, under Sections 201 and 203 P. C. (2 R. C. C. R., 45).

Causing death by branding a thief without the knowledge that the act was so imminently dangerous that it would in all probability cause death, or such bodily injury as was likely to cause death, is punishable under this Section (7 W. R., 54).

Where a Sessions Judge in charging a Jury in a case of culpable homicide, not amounting to murder, omitted to draw their attention to the two classes of culpable homicide mentioned in this section, the High Court considered that the accused were found guilty of the lighter description, and sentenced the accused to the punishment for such lighter description (15 W. R., 17 ; 6 B. L. R., App. 86).

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government, for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence, provided that such sentence has been pronounced after trial before a tribunal in which an Officer of Government duly authorized in behalf by such Native Prince or State, or by the Governor-General in Council is one of the presiding Judges.

When the Sessions Judge convicted the accused of culpable homicide not amounting to murder, and sentenced him to seven years' rigorous imprisonment, the Chief Court on the Revision side not finding any of the "*exceptions*" under Section 300, I. P. C. established, altered the conviction to one of murder and sentenced the accused to transportation for life (6 P. R., 15).

[*Ct. of S. or M. of
1st Class.*][*Cog. Bailable.*
[*Warrant.*]

304A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Section 13, Act XXVII of 1870. The following chapters of the Penal Code, namely, IV (*general exceptions*), V (*of abetment*), and XXIII (*of attempts to commit offences*), shall apply to offences punishable under this Section 304A.

The Code as it originally stood contained no adequate provisions for the punishment of what English lawyers called manslaughter by negligence. The present section, added by the amending Bill of 1870, supplies the omission. (See Section 12, Act XXVII of 1870.)

Under the Penal Code, as it originally stood, it was ruled in *R. v. Huree Dass Pall*, 6 W. R., 86, that if the offence of which the prisoners were guilty did not fall under the head of culpable homicide amounting to murder, and from absence of intention to kill, or to do such bodily injury as was sufficient to cause death, did not amount to murder, the only offence of which the prisoner could be convicted was that of causing grievous hurt.

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

305. If any person (11) under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets (107) the commission of such suicide shall be punished with death (53) or transportation for life (53), or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

See note under Section 300, Exception 5 *ante*.

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

*306. If any person (11) commits suicide, whoever abets (107) the commission of such suicide shall be punished with imprisonment of either

Abetment of suicide.

description (53) for a term which may extend to ten years, and shall also be liable to fine.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*307. Whoever does any act (33) with such intention or knowledge, and under such circumstances, that if he by that act caused death (46) he would be guilty of murder (300), shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine; and if hurt (319) is caused to any person (11) by such act, the offender shall be liable either to transportation for life or to such punishment as is hereinbefore mentioned.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

When any person offending under this section is under Attempts by life sentence of transportation for life, he may, if hurt is caused, be punished with death.
convicts.

This section as originally framed, provided that a person attempting to murder, might, if hurt was caused, be transported for life or imprisoned for ten years. But where the offender was already transported for life, the law as it stood actually awarded no penalty. The latter part of Section 307, as it at present stands, was added to the Penal Code by the amending enactment of 1870, Act XXVII, Section 11.

24 and 25 Vict., chap. 100, secs. 11, 13, 14, and 15, deals with the offence contained in this Section 307. In order to bring the case within the above sections, it must be proved that the prisoner intended by the act charged to cause the death of the suffering party. This will appear either from the nature of the act itself, or from the expression and conduct used by the prisoner (*Reg. v. Cross*; *Reg. v. Jones*). It will be an offence within these sections if the party shoot at A with the intent to murder B (*Reg. v. Holt*. *Roscoe*, 6th edition, 270).

In order to constitute the offence of attempt to murder under this Section 307, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events. *Aliter* under Sections 299 and 300. Therefore, when the prisoner presented an uncapped gun at E. G. (believing the gun to be capped) with the intention of murdering him, but was prevented from pulling the trigger—*Held* that he could not be convicted of an attempt to murder upon a charge framed under this Section 307 of the Penal Code; but that under the same circumstances he might be convicted upon a charge of simple attempt to murder framed under Section 511 in connection with Sections 299 and 300. That a charge may be framed under Section 511, coupled with Section 299, is shown

from Section 10, Act XXIII of 1862. Section 307 is not exhaustive. An act may amount to an attempt to murder, under Section 511, coupled with Section 299, which does not satisfy all the requirements of Section 307.

[*Couch, C. J.*—It may be said that the nature of the murder attempted is here defined; and the prisoner is charged with attempt to commit that murder.]

[*Westropp, J.*, believed it to be consistent with common sense that the act herein related was an act sufficiently approximate to the commission of the offence to bring it within Section 511, and that Section 307 was not intended to exhaust all attempts to commit murder which should be punished under the Code.]

Bombay H. Ct. Reports (4 Part I 1868, 17-25, Criminal Crown Cases. *Reg. v. Francis Cassidy*).

Illustrations.

(a.) A shoots at Z with intention to kill him, under such circumstances that if death ensued A would be guilty of murder. A is liable to punishment under this section.

(b.) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c.) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section; and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of this section.

(a.) A intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping. A has not yet committed the offence defined in this section. A places the food on Z's table, or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

*308. Whoever does any act (33) with such intention or knowledge, and under such circumstances that if he by that act caused death (46) he would be guilty of culpable homicide (299) not amounting to murder, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

both; and if hurt (319) is caused to any person by such

act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

See note on Section 307 *ante*, in *re* Reg. v. Francis Cassidy; the wording of this and the preceding section are similar. This section is no more exhaustive than Section 307; here, as there, the attempt must be carried to the point of completion.

Illustration.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
[Warrant.]]

*309. Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, and shall also be liable to fine.

Attempt to commit
suicide.

"Dr. Muir of Madras has collected statistics which show that in India (Bengal Presidency and British Burmah) the proportion of suicides in a population of fifty-five millions is 1 in 25,300 against 1 in 15,200 in England. Among the various causes of suicide in India, those on account of (1) *revenge* or for *accusation*, (2) for *religion*, and (3) in consequence of *physical suffering*, are very remarkable; (4) *suicide* on account of *grief* and *shame* is not unfrequent. Instances of suicide by *Burial*, by *Poison*, and in other ways by sitting *Dhurna*, were formerly not unfrequent in India." The following conclusions upon very extensive data have been arrived at by Dr. Muir: "In India, of the various methods of committing suicide, drowning occupies the first position, and next comes hanging. In England hanging occupies the first position, then follows poisoning, cut throat, and lastly drowning. In India men resort to hanging and drowning as a means of self-destruction in about equal numbers, while six out of seven women who commit suicide prefer the water. In England four times as many males as females destroy themselves by hanging, and the same proportion by cut throat, while the number of males and females who commit suicide by drowning and poison is about equal. The number of suicides by lethal weapons is exceedingly small compared with that which exists in England. The most common causes of suicide in India are jealousy, family discord, destitution, and physical suffering. Jealousy, with all the bitter feelings it engenders, is the cause of a large number of female suicides" (Chev., M. J., 658, 670).

Attempts to commit suicide are of three classes: 1st, persons who are driven to attempt suicide by real intense suffering, either mental or bodily.

Every instance of this kind should be treated according to its peculiar features. *2nd*, where suicide is attempted in a moment of passion, with little or no reflection, and no very definite motive. Punishment, though perhaps not severe punishment, should be inflicted. In the third class, viz., the class of suicide which partakes of the nature of Dhurna, emphatic punishment is almost always necessary (P. 183, Cir. 164, October 27th, 1860. Mr. Campbell's Circulars, J. C. O.).

The English law of forfeiture of the personal property of persons committing suicide, if ever applied to Europeans in India, is not applicable to natives. *Quære*, whether the law ever had existence as regards Europeans in India? *Ad. Gen. Bengal v. Ranee Shurnomoye* (1 W. R., 14). Fine alone is not a legal punishment for the offence constituted by this section, there must be some imprisonment (1 Bo. H. Ct. R., 4).

If two persons mutually agree to commit suicide together, but only one of them dies the survivor is guilty of murder (*R. v. Dyson*, R. & R., 523; *R. v. Alison*, S. C. & P. 418). And in the recent (August, 1872) and well-known case of the Chelsea tragedy, where two young Germans agreed to commit suicide together and the one, Herman Nagel, shot the other, Paul May, and then shot himself dead, Paul May surviving; the Coroner in his summing-up said: "But all the circumstances pointed to the probability—he might say to the almost certainty—that these two young men had determined to die together. Whether one was to shoot the other, or each to shoot himself, they had determined to cease to exist, had locked themselves in the room, and carried out their intentions. Whether it was carried out in the way May intended or not was not material; because the point was if two people agreed to commit suicide, the one died and the other survived, the one who survived was guilty of murder. They were both *participes criminis*—both were guilty of murder. That was the position; and though there were many matters which might be gone into to show their motives and their previous history, still the main point was that they agreed to die together; that one died, and that the other who was living was responsible and guilty of the murder of the man who was dead." Under this direction the jury gave a verdict of wilful murder against Paul May.

It is a *presumptio juris* founded partly on the principle that every person must be taken to intend that which is the immediate and natural consequence of his deliberate acts, but deriving additional force from considerations of public policy, that where the fact of slaying has been proved, malice must be intended, and that all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him. But it may be made a question whether this presumption holds in a case of suicide, where the only fact established before a Coroner's Jury is, that the deceased terminated his own existence, and there is no evidence as to the state of his mind at the time. (See *Borradaile v. Hunter*.) It is submitted that the presumption does not apply to such a case, and for the following reasons:—

1st.—The presumption of malice is only a rebuttable presumption, adopted on the ground, that to call on the *living* person to justify a homicide,

may be advisable in public policy, and can work no hardship to the accused—an argument wholly inapplicable to the case of a person who being no more, cannot be called on to justify or explain anything.

2ndly.—Presumptions ought to be based on what most usually and generally exists. In many, probably most cases of suicide, mental alienation in some or other form is present; in murder it is quite otherwise.

3rdly.—The man who commits murder has only moral and religious feelings to subdue; he who destroys himself has also to struggle against the primary law of nature—self-preservation.

4thly and lastly, there seems no good reason why the law should in this case lose sight of its own maxim, "*Nemo presumitur esse immemor æternæ suæ salutis et maxime in articulo mortis*" (Best P. L. and F., 177).

Suicide it appears was no crime in the early Pagan creed; but Virgil evidently thought that to take away one's own life was to desert the post of duty, for when led by Sybil through the various regions of the world below, on coming to the region of those unhappy ones, he says:—

"Who all, for loathing of the day,
In madness threw their lives away:
How gladly now in upper air
Contempt and beggary would they bear,
And labour's sorest pain!
Fate bars the way: around their keep
The slow unlovely waters creep,
And bind with three-fold chain."

—*The Æneid* (Conington's.)

A, a Hindu widow, intending to commit Sutte, went out to be burned with the corpse of her husband. B, C, and D collected fuel, and as they were going to set light to the pile were arrested by the police. A was tried and convicted by Magistrate under this section and B, C, and D under sections 309 and 511. Conviction was wrong as the offence committed comes under Section 300, exp. 5 (see note under that section. *R. v. Muharain*, unreported case, Oudh).

310. Whoever at any time after the passing of this Act (XLV of 1860) shall have been habitually associated with any other or others for the purpose of committing robbery (390) or child-stealing, by means of or accompanied with murder (300) is a thug.

Thug.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*311. Whoever is a thug (310) shall be punished with

Punishment. transportation for life, and shall also be liable to fine.

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State, in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence or for abetment, within the meaning of the Penal Code, of such offence, provided that such sentence has been pronounced after trial, before a tribunal in which an Officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council is one of the presiding Judges.

Act XXX of 1836 prescribed punishment for Thuggee; that Act was repealed by Act XVII of 1862, and this latter Act was repealed by Schedule 1, Part II, C. C. P.

Information to be given regarding thugs, dacoits, robbers, and receivers of stolen property, compulsory by Regulation VI, 1810, Section 2; Regulation I, 1811, Section 10; Regulation XX, 1817, Section 33. (Omitting to give such information punishable under Sections 176-177, P. C.)

Thuggee and Strangulation, although now almost entirely suppressed, could scarcely have been operative for so many centuries throughout the length and breadth of India without leaving strong traces of its marked atrocities upon the criminal habits of the people. It is considered that Thuggee has prevailed in all parts of India ever since the first irruption of the Mussulmans. By the Mahomedan law, a person strangling another was not liable to suffer death, according to the doctrine of Aboo Huneefah (though he was in the opinion of the two disciples) unless he be notorious for committing this offence; in which case (*i. e.*, evidently of systematic Thuggee) if he have not shown signs of repentance before he is apprehended, he should be punished with death as an example (*Harington*, p. 269). So also a strangler confessing his crime, or detected with the usual implements of strangling and stolen property, may be sentenced by the Iman to beheaded and crucified (p. 382). The Inspector-General of Police, North-Western Provinces, in his Report for 1867, said:—"I am convinced that no such thing as Thuggee exists now in the North-Western Provinces" (p. 110). Nevertheless, it has been shown that the practice of *Thuggee by poison* is still very prevalent throughout all India. Several of the deadliest poisons are so easily procurable, and are so well known in every part of the country, that it is not surprising that they should be employed by any unprincipled native in the furtherance of his criminal designs; still, with due caution, no instance of drugging or poisoning, by any ordinary criminal, ought to be mistaken for an example of systematic Thuggee. It is only too evident that the native dealers part with their poisonous wares with the most reckless indifference. A few years since many Thugs assumed the character of shopkeepers as a means of facilitating their iniquitous designs. There is in nearly every

village throughout the country a hag of low caste and evil repute, half *dai*, half *dain*, suspected as a witch, professedly a midwife; equally ready at all times to practise as a doctress, a sorceress, or a bawd; and carrying on a systematic trade in the procuration of abortion by the use of the most deadly poisons. Persons well acquainted with the habits of the natives, believe these women to be professional poisoners. Intoxicating drugs are employed by childstealers in Bengal, and they are had recourse to by criminals in Bombay, and it has been broached whether animal magnetism may not sometimes be resorted to for this purpose. Formerly among the gangs of Thugs there was a considerable amount of organization, and Thugs from distant parts of India, who had never met before, and whose language differed, could recognize each other by signs known only to the initiated, and had also a slang language of their own. Dhatoora appears to be the usual poison used, sometimes Koochila (*nux vomica*). Thugs and Dacoits are generally worshippers of Kalee (Chev., M. J., 148, 179, 576).

Although the *old* crime of "Thuggee by strangulation" is now fast dying out as a profession, it has almost everywhere found an equally terrible successor in "Thuggee by dhatura." That the former should have been more successfully combated than the latter, was perhaps only natural, considering the difficulties which exist in identifying professional cases of dhatura poisoning. The system of operation is however nearly always the same. A traveller is going along the road, a civil stranger accosts him, they sit down together to cook their evening meal. The stranger sees the traveller has not enough ghee and gives him a little. Next morning passers-by find a man lying dead under a tree, the ashes of a small fire and a cooking utensil giving the only clue to the cause of his death. Or again, as is often the case, the victim, under the effects of the dhatura, roams about the country like a madman, no one heeding him, until at last he sinks down far from the track of passers-by, or the route known to have been taken by the gang to whom his death might otherwise have been attributed.

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS.

"The laws prohibitory of criminal abortion in India are to be found in Sections 312 to 316, inclusive, of the Indian Penal Code. In a country where six-sevenths of the widows, whatever their age or position in life may be, are absolutely debarred from re-marriage, and are compelled to rely upon the uncertain support of their relatives, it is scarcely surprising that great crimes should be practised to conceal the results of immorality, and that the procuring of criminal abortion should have become a trade among certain of the lower midwives. The crime is so common in Bengal that every child knows of it, and it has acquired the appropriate name of *pet-phela*, and *pet phelanee* is a term of abuse often used by one woman against

another. The folly of the Hindoos preventing the re-marriage of widows may be seen from the following figures :—Calcutta, with a population of about 416,000, supports 12,419 prostitutes avowed and shameless. (London with its 2,000,000 is said to contain 7,000 to 8,000.) Of these unfortunates not less than 10,461 are Hindoos: and from the first report on the working of the Contagious Diseases Act in Calcutta, dated 1st April, 1870, we learn that there were then *registered* as prostitutes in Calcutta 7,939 Hindoos, 1,162 Mahomedans, 56 Eurasians, 15 Poles, 7 Italians, 5 English, 4 Germans, 3 Russians, and 1 Jewess. (For how abortions are caused, *vide* Chev., M. J., 712, 743.)

[Ct. of S.]

[Uncog. Bailable.]
[Warrant.]

*312. Whoever voluntarily (39) causes a woman with child to miscarry, shall, if such miscarriage be *not caused in good faith* (52) for the purpose of saving the life of the woman, be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both; and

[Ct. of S.]

[Uncog. Bailable.]
[Warrant.]

if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry is within the meaning of this section.

To miscarry.—Miscarriage is defined by Wharton in his Law Lexicon as “the premature expulsion of the contents of the *gravis uterus* before the term of gestation is completed”; by the English law the term abortion is applied to the throwing off of the foetus at any period of the pregnancy. The offence contemplated in this section can only be committed in the case of a woman being pregnant; to attempt to procure miscarriage from a mistaken belief that the woman was with child, but who is, in fact, not so, is not punishable, by the wording of this section; the words “a woman with child” are plain. By the explanation attached to this section a woman who causes herself to miscarry is within this section. Under the English law it is no excuse that the woman consented to, or even solicited the perpetration of the offence; for this would be to set the law at naught, inasmuch as the crime is seldom attempted, but with the woman’s approval. It should never be forgotten by those engaged in judicial investigation of this offence that abortions, from natural, habitual, and non-criminal causes, are so frequent, that medical experience indicates that one in three of all conceptions in London terminates in abortion. Connected with this subject is this very serious question: is it, under any circumstances, morally and legally justifiable for a medical man to induce premature delivery? (Tay. Med. J., 518.)

Not caused in good faith.—A causes a woman to miscarry in good faith, with or without her consent, for the purpose of saving her life. A commits no offence under this section.

If A had her consent he comes under the general exception contained in Section 88, P. C.

A woman with child.—The offence defined by this section can only be where the woman is, *in fact*, pregnant; but to constitute the act of abetment it is not necessary that the act abetted should be committed. A woman, may fail involuntarily in causing abortion, not being pregnant, but B who instigated her, believing her to be pregnant, may be guilty of abetting an offence (Reg. v. Kabut Patten. 15 W. R., 4).

[*Uncog. Not bailable.*
[*Warrant.*]

[*Ct. of S.*]

*313. Whoever commits the offence defined in the last preceding section without the consent of the woman whether the woman is quick with child or not, shall be punished with transportation for life (53) or with imprisonment of either description (53) for a term which may extend to ten years, and shall be liable to fine.

Vide note under Section 312 *ante*, and for consent see Sections 90 and 91 *ante*.

[*Uncog. Not bailable.*
[*Warrant.*]

[*Ct. of S.*]

*314. Whoever, with intent to cause the miscarriage of a woman with child, does any act (33) which causes the death (46) of such woman, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine; and if the act is done without the consent of the woman, shall be

Death caused by an act done with intent to cause miscarriage.

ment of either

If act done without woman's consent.

[*Uncog. Not bailable.*
[*Warrant.*]

[*Ct. of S.*]

punished either with transportation for life, or with the punishment above mentioned.

Vide note under Clause 4, Section 300, *in re* Queen v. Kalachand Gopee, &c.

Explanation.—It is not essential to this offence that the

offender should know that the act (33) is likely to cause death (46).

As already remarked under Section 312, it is essential that the woman should actually be pregnant and not merely erroneously believed to be pregnant.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

***315.** Whoever before the birth of any child does any act (33) with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith (52) for the purpose of saving the life of the mother, be punished with imprisonment of either description (53) for a term which may extend to ten years, or with fine, or with both.

Act done with intent to prevent a child being born alive or to cause it to die after birth.

By English law, if a child be born alive, but dies by reason of the potion or bruises which it received in the womb from a person who administered the potion or inflicted the bruises for the purpose of a miscarriage, it would be murder, unless the act of procuring a miscarriage was under the circumstances lawful (Arch. 517). Midwives (*dhaees*) trade in procuring abortions. The native midwife is said by Dr. Chevers in his Medical Jurisprudence to be always of low caste. "The Hindoo midwives in Bengal are Chumarins, the skinner caste. They are often quick-witted, but barbarously ignorant."

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

***316.** Whoever does any act (33) under such circumstances that if he thereby caused death (46) he would be guilty of culpable homicide (299), and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Causing death of a quick unborn child by an act amounting to culpable homicide.

"Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as the infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise kills it in her womb; or if

any one beat her, whereby the child dies in her body and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter; and now by English law, trying to procure abortion is a felony punishable with transportation for life. An infant *en ventre de sa mère*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy. It may have a guardian assigned it (1 Black. Com., 116).

The prisoner had prepared a medicine by pouring boiling water on the leaves of the shrub, and the medical men examined stated that such preparation is called *infusion* and not a decoction. It was objected that the medicine was misdescribed. Lawrence, J., overruled the objection. He said *infusion* and decoctions are *ejusdem generis*, and the variance is immaterial. The question is whether the prisoner administered *any thing* or matter to the woman with intent to procure abortion (Reg. v. Philips). This decision was recognized *in re Reg. v. Coe*. The counsel for the prisoner cross examining as to the innocuous nature of the article administered, Vaughan, B., said, "Does that signify? It is with the intention that the Jury have to do; and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by Act of Parliament" (Roscoe, 251).

The following remarks refer more or less to the four preceding sections. Under Section 312, it is necessary for the prosecution to prove that the woman was really pregnant, and under Section 315 the charge should describe the act by which the accused intended to prevent the child being born alive, and further that the act was not done in good faith to save the mother. A child *en ventre de sa mère* cannot under the English law be the subject of murder. At common law, an attempt to destroy a child appears to have been held to be misdemeanour (3 Chitt. Cr. L., 798). If, however, with the attempt to procure abortion, a person does an act whereby a living child is brought into the world immaturely, and who dies in consequence, that would be murder in the person doing the act (Reg. v. West). The intent in cases of abortion will probably appear from other circumstances of the case. That the child was likely to be born a bastard, and be chargeable to the reputed father, the prisoner, would be evidence to that effect. Proof of the clandestine manner in which the drugs were procured or administered, would tend to same conclusion (Roscoe, 250, 252).

It is said to be a *presumptio juris et de jure*, that a child born during wedlock, and of which the mother was visibly pregnant at the time of the marriage, must be taken to be the offspring of the husband (Phil. Ev., 463); so every child born during wedlock, where the supposed parents are neither *infra nuptiles annos*, nor physically disqualified for sexual intercourse, is presumed legitimate, according to the maxim "*pater est quem nuptiæ demonstrat*." This presumption does not hold where the parties are separated by a divorce *à mensâ et thoro* pronounced by a Court of competent jurisdiction, in which case obedience to the sentence of the Court will be presumed. The regular and usual period of gestation is said to be nine *calendar* months, but others fix it at ten *lunar* months, being 280 days, or nine *calendar* months, and about a week; but a difference of

days or weeks may take place, as there are numerous causes, both physical and moral, by which delivery may be accelerated or retarded. In all investigations of this nature the character and conduct of the mother are elements of the highest importance to be taken into consideration, as also the respectability or otherwise of the deposing witnesses, and the motives to falsehood or fabrication which may exist on either side (Best P. L. and F., 170 and 171).

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

*317. Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, *shall expose* or leave such child in any place with the intention of *wholly abandoning* such child, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, or with fine, or with both.

Explanation.—This section is not intended to prevent the trial of the offender for murder (300) or culpable homicide (299), as the case may be, if the child die in consequence of the exposure.

The following case shows the law in England as to endangering life by exposure of child. By the statute 24 and 25 Vict., chap. 100, Section 27, any person unlawfully abandoning or exposing a child under the age of two years, whereby its life is endangered, or its health has been or is likely to be permanently injured, is guilty of misdemeanour. The prisoners were mother and daughter, and the latter had given birth to an illegitimate child. Some time before the birth, the alleged father had told her that he would not pay for the child, but that he would keep it, if it were sent to him. When it was about five weeks old, the two prisoners wrapped the child up in wool and put it in a basket, and conveyed it about five miles in a steamer from Stockton to Middlesborough, at which place the younger prisoner booked the parcel at the railway station for Gainsborough; she paid 6d. and requested the railway servants to be very careful with the hamper. It was addressed to the alleged father at Gainsborough, with words "with care, to be delivered immediately." The hamper reached Gainsborough that evening, (the railway journey having occupied half an hour), and was left by a railway porter at the address mentioned; a paper was found inside the hamper

bearing the words "please take care of this child, for George Beaumont is the father of it." The child was ultimately taken to the Union Workhouse at Gainsborough, where it died about three weeks afterwards. The medical evidence did not show that the journey in the hamper in any way hastened the death which arose from entirely different causes, the child having always been very delicate. It was objected on behalf of the prisoners that there was no evidence to go to the Jury, it not being shown that there was any risk in the transmission, and the death arising from an independent cause. The prisoners having been both convicted, this point was reserved. The case came before the Court of Criminal Appeal in Michaelmas term last, when no Counsel appeared on either side. The judges present being divided in opinion on the subject, the question was referred to the 15 Judges, and Cockburn, C. J., now announced that a majority of the latter had arrived at the conclusion that there was evidence to go to the jury of an offence within the above statute, and the conviction was therefore affirmed.

The words "if the child die in consequence of the exposure" mean that death must be caused from some result of the exposure. Where a child was found shortly after its exposure, and died from ineffectual means being used to feed it, a conviction for murder was set aside (*Queen v. Khoda Bux*). To support a conviction under this section, there must be proof that the accused was the father, mother, or person having care of such child, and that he or she abandoned it and intended so to do. By the English law, abandonment alone, without proof that the child's health was thereby injured, is not sufficient (*Reg. v. Friend*. *Reg. v. Cooper*. *Reg. v. Hogan*. *Reg. v. Philpot*).

The following case was tried under 24 and 25 Vict., cap. 100, Sec. 51. It appeared that the prisoner was a married man living separate from his wife, the latter taking charge of their child, which was nine months old. The wife was proved to be in great want and distress, and went to the prisoner's house to ask for some money or food. He did not give her any, and she went away, leaving the child on the door-step. The prisoner soon after went out, passing the child. He returned about three hours after and, on his attention being drawn to the child, he remarked that the mother ought to be tried for murder. After the child had been left about six hours, it was found by a policeman in the road close by, quite cold and stiff, with its head uncovered and dressed in very short clothes. It was urged on behalf of the prisoner that on the above state of facts there was not any evidence against him: that his wife was the person who had undertaken the charge of the child; and that she alone had abandoned and exposed it, and was, therefore, the proper and only person to be indicted. The prisoner was found guilty, but a case was reserved.

The case was not now argued by counsel.

The Court (Bovill, C. J., Martin, B., Bramwell, B., Channell, B., and Blackburn, J.) affirmed the conviction. There was ample evidence of "abandonment and exposure" against the prisoner. He knew where the child was and made no attempt to rescue it, and he was, therefore, accessory to the offence which his wife had committed. Moreover, he was

bound by law to maintain his own child, and his neglect of it under such circumstances was an offence within the above section (*R. v. White*, 6 M. J., 399).

Shall expose.—*Held* that where from the circumstances it appeared that a child who had been exposed by the prisoner did not die in consequence of the exposure, except in a remote degree, the prisoner, though guilty under Section 317, P. C., could not be convicted of murder. That section contemplated cases in which death is caused from cold or some other result of exposure (10 W. R., 52. *Reg. v. Falkingham*. *Queen v. Khoda Bux Fakeer*).

Wholly abandoning.—*In re Felani Huriani*, the Calcutta High Court said that this section was intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner that the children, not being able to take care of themselves, may run the risk of dying or being injured (16 W. R., 12).

Where the prisoner caused the death of her infant child, by purposely abstaining from giving the deceased any nourishment, but did not part with the custody of, or abandon the child. *Held*, that the prisoner was wrongly convicted of an offence under this section of the Indian Penal Code (*Must Ram Dai v. Reg.*, 5 P. R., 32).

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.
[Warrant.]*]

*318. Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals, or endeavours to conceal, the birth of such child, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Concealment of birth
by secret disposal of
dead body.

In the Province of Oudh the crime of infanticide, we learn from the Administrative Report of 1869-70, though to a certain extent repressed and checked, has not been wholly eradicated. Independent inquiries and statistical returns bear this out. It remains to be seen how the special preventive measures contemplated under Act VIII of 1870 will answer.

No doubt the best preventive measure will be found in taking a periodical census of girls under six years of age. This will be the means of distinguishing the murderers of their infants from those who are not steeped in this infamous practice. But something more than a merely coercive system, supported by penal enactments, is needed to give permanency to any measure for the suppression of this crime. All circumstances must be taken into consideration in dealing with this hereditary crime, and any primitive measures adopted should be strict without being necessarily

vexatious and annoying in details. From the very nature of the crime and the manner in which it is carried out, not requiring much preparation, and unattended with the display of an overt act like Suttee, or throwing oneself under the wheels of Juggernaut, the measures necessary for detection must be to a certain extent inquisitorial, but every care should be taken that the necessary domiciliary visits of the Police and others appointed for that purpose have some more satisfactory results than merely that of enriching the visitor; and, therefore, whenever it is possible to carry out the measures through the people themselves, that is, head men of villages and punches, it should be done. The difficulties that surround this question are by no means few or small, but it has never been the practice of the English Government to shrink from a necessary duty merely because it was heavy. The system of diplomacy in putting down marriage expenses and the preventive measures system, such as registration, and quartering police on suspected villages, might be introduced simultaneously, acting as auxiliaries to each other. Our only hope of permanent success lies in destroying the principle to which this hateful custom owes its existence. Education will do much for the rising generation, but a weary interval must pass before knowledge is generally diffused through the masses.

It often happens that the dead body of a new-born infant is found under very suspicious circumstances, but it cannot be proved that it was born alive or murdered. This section deals with such cases.

Sections 312 to 318 deal with causing of miscarriage, of injuries to unborn children, of the exposure of infants, and of the concealment of births. The two latter offences herein mentioned have somewhat to do with the heinous offence of female infanticide, which a short time back prevailed to so great an extent, but which has now been specially legislated for by Act VIII of 1870, and is being dealt with by the several Local Governments. The real causes of this crime of infanticide appear to be pride, poverty, avarice, and superstition. The root of the evil lies in the expense incurred in marriage pageantries and festivities, and the feasting of numberless hangers-on, a motley rabble of

"MENDICI MIMÆ BALATRONES ET HOC GENUS OMNE."

Another cause is the impunity with which the crime can be committed, and lastly the false pride, ignorance, and impurity of thought amongst the Rajpoots. If the first and second could be overcome, the third would be of no great hindrance, doubtless education will have done sufficient for the rising generation to enlighten their ignorance and purify their thought. The chief means of causing death appear to be placing the after-birth over the child's face, and so suffocating it, with holding nourishment, exposure, administering either salt, opium, or bangh, and the effects of this nefarious practice are necessarily most demoralizing, as is seen by their impurity of thought; and, moreover, it is productive of other immoral practices: for instance, kidnapping of female children of other castes for the purpose of selling them to Rajpoots, the latter being unable, from the paucity of female children among themselves, to obtain wives of their own caste. To supply this demand, children are enticed away or stolen by professional child-

stealers, or made a trade of by being sold by the very poor. In confirmation of this last fact, see note at Section 359 on the effects of female infanticide.

Following the analogy of English law, it appears that the place of concealment need not be intended as the place of final deposit, and the placing the dead body between the bed and the mattresses is a sufficient disposal of the body (*Reg. v. Goldthorpe*). A similar ruling is to be found *in re Reg. v. Perry*. An indictment for endeavouring to conceal the birth of a child need not state whether the child died before, at, or after the birth (*Reg. v. Coxhead*. *Roscoe*, 360 to 361).

OF HURT.

Hurt. 319. Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt.

At p. 106 the Law Commissioners say:—"A man who means only to inflict a slight hurt may, without intending or expecting to do so, cause a hurt which is exceedingly serious. A push, which to a man in health is a trifle, may, if it happens to be directed against a diseased part of an infirm person, occasion consequences which the offender never contemplated as possible. A blow designed to inflict only the pain of a moment may cause the person struck to lose his footing, to fall from a considerable height, and to break a limb. In such cases, to punish the assailant with five years of strict imprisonment would be in the highest degree unjust and cruel. It is said, and we can easily believe it, that in such cases the French juries have frequently refused, in spite of the clearest evidence, to pronounce a decision which would have subjected the accused to a punishment so obviously disproportioned to his offence.

"We have attempted to preserve and to extend what is good in this article of the French Code, and to avoid the evils which we have noted. It appears to us that the length of time during which a sufferer is in pain, diseased, or incapacitated from pursuing his ordinary avocations, though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety be employed, not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration of drugs, the setting of traps, the digging of pitfalls, the placing of ropes across a road. But though we have borrowed from the French Code this test of the severity of bodily injuries, we have framed our penal provisions on a principle quite different from that by which the authors of the French Code appear to have been guided. In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender,

"Where bodily hurt is voluntarily inflicted in an attempt to murder the person hurt, we propose to punish the offender with transportation for life, or with imprisonment for a term which may extend to life, and cannot be less than seven years. It does not appear to us that, where the murderous intention is made out, the severity of the hurt inflicted is a circumstance which ought to be considered in apportioning the punishment. It is undoubtedly a circumstance which will be important as evidence. A Court will generally be more easily satisfied of the murderous intention of an assailant who has fractured a man's skull, than of one who has only caused a slight contusion. But the proof might be complete. To take examples which are universally known:—Harley was laid up more than twenty days by the wound which he received from Guiscard; the scratch which Damien gave to Louis the Fifteenth was so slight that it was followed by no feverish symptoms. Yet it will be allowed that it would be absurd to make a distinction between the two assassins on this ground.

"We propose that when bodily hurt is inflicted by way of torture, the punishment shall be very severe. In England, happily, such a provision would be unnecessary. But the execrable cruelties which are committed by robbers in this country for the purpose of extorting property, or information relating to property, render it absolutely necessary here. We propose that in such cases, if the hurt inflicted be what we have designated as *grievous*, the offender shall be punished with transportation for life, or with imprisonment for a term which may extend to life, and which shall not be less than seven years. Where the hurt is not *grievous*, we propose that the imprisonment shall be for a term of not more than fourteen years, nor less than one year."

"*Mayhem*" is defined by Blackstone "as an injury still more atrocious than wounding, and consists in violently depriving another of the use of a member for his proper defence in fight. For assault, battery, wounding, and "*mayhem*," an indictment may be brought as well as an action, for each offence is at common law a misdemeanour, and by several statutes malicious injuries to the person are severely punishable. Both indictment and action may be prosecuted: the one at the suit of the Crown for the crime against the public; the other at the suit of the party injured, to make him a reparation in damages" (3 Black. Com. 128).

Grievous hurt. 320. The following kinds of hurt (193)
only are designated as "*grievous* :"—

Firstly. Emasculation.

Secondly. Permanent privation of the sight of either eye.

Thirdly. Permanent privation of the hearing of either ear.

Fourthly. Privation of any member or joint.

Fifthly. Destruction or permanent impairing of the powers of any member or joint.

Sixthly. Permanent disfiguration of the head or face.

Seventhly. Fracture or dislocation of a bone or tooth.

Eighthly. Any hurt which endangers life, or which causes the sufferer to be, during *the space of twenty days*, in severe bodily pain, or unable to follow his ordinary pursuits.

Where a party is being assaulted, and who is entitled to defend himself, unnecessarily resorts to the use of a deadly weapon, he may by English law be convicted of wounding with intent to do grievous bodily harm (Reg. v. Adgar. Roscoe, 531).

There must be evidence to prove that hurt as described in Section 320, P. C., as grievous hurt, has been caused before a conviction can be had under this section.

A letter of a medical officer expressing an opinion is not evidence under Section 323, 12 W. R., 25.

The space of Twenty Days.—Where a man was so hurt as to be compelled to go to Hospital, and left cured on the 20th day—held that this day would count as one of the twenty days during which he had been unable to follow his ordinary pursuits (Reg. v. Sheikh Bahadoor, Mad. H. C., 1862).

A man who being first struck, strikes his assailant in the mere heat of passion and causes his death, commits "*grievous hurt*," not culpable homicide (1, R. J. P. J., 125).

A conviction by a Magistrate for hurt does not prevent a Judge ordering the commitment for culpable homicide of a person so convicted (1 R. J. P. J., 1863, 287, Letter No. 1,062).

When there is neither intention, knowledge, nor likelihood that the injury inflicted in an assault will or can cause death, the offence is not culpable homicide, but grievous hurt (2 W. R., 39).

321. Whoever does any act (33) with the intention of thereby causing hurt (319) to any person
Voluntarily causing hurt. (11), or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "*voluntarily to cause hurt*."

Where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by the wife, the husband not knowing that

the spleen was diseased, and showing by the blow itself, and by his conduct immediately afterwards, that he had no intention or knowledge that the act was likely to cause hurt endangering human life, *Held* that the husband was guilty of an offence under Sections 319 and 321, P. C., and not under 320 and 322, P. C. (8 W. R., 29).

322. Whoever voluntarily causes hurt (321), if the hurt (319) which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Voluntarily causing
grievous hurt.

Explanation.—A person is not said voluntarily to cause grievous hurt (322) except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily (39) to cause grievous hurt, if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

See note under preceding section.

In re R. v. Ward, charged under 14 and 15 Vic., c. 19, s. 5, and 25 Vic. c. 100, secs. 18, 20, *unlawful wounding*—*Held*, a man must be supposed to contemplate the results of his own act; and if he shot under circumstances which rendered the wounding of the prosecutor a *probable result*, he was guilty of both unlawful and malicious wounding; even if he shot with intent only to frighten the prosecutor, he would be guilty (7 M. J., 270).

Illustration.

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

[*Any Mag.*]

[*Cog. Bailable.*]
[*Summons.*]

*323. Whoever, except in the case provided for by Section 334,—[on provocation]—voluntarily causes hurt (321), shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. (*Tri-*

Punishment for vol-
untarily causing hurt.

able summarily under Section 222, C. C. P.; also under Section 225, C. C. P.)

If this section was referred to in the charge made out under Chapter XIII, C. C. P., as the section under which the offender charged was punishable, the existence of the exception here mentioned was to be *distinctly* denied in the body of the charge.—*Vide* Section 237, C. C. P., Act XXV, 1861, and Circular dated the 11th March, 1863, H. Ct., Calcutta.

This was altered by Section 105 of the Evidence Act, which laid it down, "that when a person is accused of any criminal offence, the burden of proving the existence of circumstances as bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, is upon him, and the Court shall presume the absence of such circumstances.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.
[Summons.]*]

*324. Whoever, except in the case provided for by Section 334,—[on provocation]—voluntarily causes hurt (321) by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any corrosive substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Held that where the prisoners were charged under Section 148, P. C., of rioting armed with deadly weapons, and also under this section, they should have been sentenced only under *one or other* of these sections, the charges being, properly speaking, only alternative charges (10 W. R., 63).

If this section was referred to in the charge made out under Chapter XIII, C. C. P., as the section under which the offender charged was punishable, the existence of the exception here mentioned was to be *distinctly* denied in the body of the charge.—*Vide* Section 237, C. C. P., and Circular dated 11th March, 1863, H. Ct., Calcutta.

This was altered by Section 105 of the Evidence Act, which laid it down, "that when a person is accused of any criminal offence, the burden

of proving the existence of circumstances as bringing the case within any of the general exceptions in the Indian Penal Code, or within special exceptions or proviso contained in any other part of the same Code, is upon him, and the Court shall presume the absence of such circumstances.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.
[Summons.]*]

*325. Whoever, except in the case provided for by Section 335,—[on provocation]—voluntarily causes grievous hurt (322), shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

It is to be noted that fine alone is not a legal punishment under this section; if the offender is convicted under this section he shall be imprisoned, and he may be fined as well.

Under the original C. C. P., Act XXV of 1861, column 7 of the Schedule, this offence was triable by the Court of Sessions only; this was amended by Act VIII of 1866, section 1, and the words "any Magistrate" substituted. This was again altered by the Schedule to Act VIII of 1869, and the power conferred by Section 1, Act VIII of 1866 was curtailed, and the offence of voluntarily causing grievous hurt was made triable by the Court of Sessions, or Magistrate of the District, or subordinate Magistrate of the first class. This is one of the very few instances where the Legislature, having once extended the powers of judicial officers has subsequently curtailed them. The tendency undoubtedly is rather to increase than decrease, and this assuredly is going in the right direction.

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government, for the periods specified in their respective sentences, of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence; provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor General in Council, is one of the presiding Judges.

The prisoner entered the house for the purpose of committing an assault, and in carrying out that intention caused grievous hurt. In convicting and punishing him for that substantive offence (grievous hurt)—held that it was not necessary to pass a separate sentence for the offence of house-trespass (2 W. R., 29).

If this section was referred to in the charge made out under Chapter

XIII, C. C. P., as the section under which the offender charged was punishable, the existence of the exception here mentioned was to be *distinctly* denied in the body of the charge (*vide* Section 237, Act XXV of 1861, and Circular dated 11th March, 1863, H. Ct., Calcutta). This was altered by Section 105 of the Evidence Act, which laid it down "that when a person is accused of any criminal offence the burden of proving the existence of circumstances in bringing the case within any of the exceptions in the Indian Penal Code, or within special exception or proviso contained in any other part of the same code, is upon him, and the Court shall presume the absence of such circumstances."

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Summons.]*]

*326. Whoever, except in the case provided for by Section 335,—[on provocation]—voluntarily causes grievous hurt (322) by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence (40), is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Held that the offence of administering deleterious drugs, when life was not endangered, is punishable under Section 328, and not under 326, P. C. (4 W. R., 4).

If this section was referred to in the charge made out under Chapter XIII, C. C. P., as the section under which the offender charged was punishable, the existence of the exception here mentioned was to be *distinctly* denied in the body of the charge (*vide* Section 237, Act XXV of 1861, and Circular dated 11th March, 1863, H. Ct., Calcutta). This was altered by Section 105 of the Evidence Act, which laid it down "that when a person is accused of any criminal offence the burden of proving the existence of circumstances as bringing the case within any of the exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same code, is upon him, and the Court shall presume the absence of such circumstances."

[*Ct. of S.*]

[*Cog. Not bailable.
[Warrant.]*]

*327. Whoever voluntarily causes hurt (321) for the

Voluntarily causing hurt to extort property or to constrain to an illegal act. purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security (30), or *of constraining* the sufferer, or any person interested in such sufferer, to do anything which is illegal, or which may facilitate the commission of an offence (40), shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Of Constraining.—With reference to the word "constraining" used in the latter part of this section, it appears to have been inserted so as to make this section applicable to all cases where, if "extortion" could not be literally proved, a compelling or constraining against the sufferer's consent was equally an offence. This applies also to Sections 327, 329, 330, 331 *post*, and also to Sections 347 and 348 *post*.

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*328. Whoever administers to, or causes to be taken by, any person (11) any poison or any stupefying, intoxicating, or unwholesome drug *or other thing*, with intent to cause hurt (319) to such person, or with intent to commit or to facilitate the commission of an offence (40), or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Causing hurt by means of poison, &c., with intent to commit an offence.

Other thing.—The words "other thing" in this section must be read "other unwholesome thing." Hence, administering a substance, as to the nature of which no evidence was given, but which was intended to act as a charm, was held to be no offence (1 W. R. C. C. 7).

To cause hurt.—*Held* that a person who placed in his toddy-pots juice of the milk-bush, knowing that if taken by a human being it would cause injury, and with the intention of thereby detecting an unknown thief who was in the habit of stealing the toddy from such pots, and which toddy was drunk by, and caused injury to, certain soldiers who purchased it from an unknown vendor, was rightly convicted under this section, and that Section 81, P. C., did not apply to the case (5 Bo. H. Ct., R., Part II, 59).

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

When a poisonous drug was administered to a woman to procure miscarriage, and death resulted, and it was not proved that the accused knew that the drug would be likely to cause death, &c., they were acquitted by the High Court of murder, and committed for an offence under Section 314 *ante* (10 W. R., 59). A person administering an innocuous drug, under the impression that it is poison, incurs punishment by *Taseer* under the Mahomedan law (1 Mac. Rep., 307). There is no law in India prohibitory of sale of poisons. The necessity for such an enactment was largely canvassed by Governments of three Presidencies of India in 1865 (Chev. M. J., 329).

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*329. Whoever voluntarily causes grievous hurt (322) for the purpose of extorting from the sufferer, or from any person (11) interested in the sufferer, any property or valuable security (30), or of constraining the sufferer, or any person interested in such sufferer, to do anything which is illegal, or which may facilitate the commission of an offence (40), shall be punished with transportation for life (53), or imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

[*Ct. of S.*]

[*Cog. Bailable.*
[*Warrant.*]

*330. Whoever voluntarily causes hurt (321) for the purpose of extorting from the sufferer, or from any person (11) interested in the sufferer, any confession or any information which may lead to the detection of an offence (40) or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security (30), shall be punished with imprisonment of

either description (53) for a term which may extend to seven years, and shall also be liable to fine.

This section is to be construed as if the word "offence" denoted any thing made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Illustrations.

(a.) A, a police officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(b.) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c.) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(d.) A, a zemindar, tortures a ryot in order to compel him to pay his rent. A is guilty of an offence under this section.

[*Cl. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*331. Whoever voluntarily causes grievous hurt (322) for the purpose of extorting from the sufferer, or from any person (11) interested in the sufferer, any confession or any information which may lead to the detection of an offence (40) or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security (30), or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing
grievous hurt to extort
confession, or compel
restoration of property.

This section is to be construed as if the word "offence" denoted any thing made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

The preceding section and this section provide for the punishment of persons causing hurt in order to obtain confessions. The law regarding evidence applicable to confession will be found in Sections 120, 121, and 122, Code of Criminal Procedure, and Sections 17 to 31 of the Evidence Act I of 1872.

[*Ct. of S. or M. of
1st Class.*][*Cog. Bailable.*
[*Warrant.*]

*332. Whoever voluntarily causes hurt (321) to any person (11) being a public servant (21) in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

*333. Whoever voluntarily causes grievous hurt (322) to any person (11) being a public servant (21) in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

[*Any Mag.*][*Cog. Bailable.*
[*Summons.*]

*334. Whoever voluntarily causes hurt (321) on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person (11) other than the person who gave the provocation, shall be punished with imprisonment of either description (53) for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under Section 225, C. C. P. ; also under Section 222, C. C. P.)

Provocation does not atone the offence, it simply goes to mitigate the punishment.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.*
[*Summons.*]

*335. Whoever causes grievous hurt (320) on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person (11) other than the person who gave the provocation, shall be punished with imprisonment of either description (53) for a term which may extend to four years, or with fine which may extend to two thousand rupees, or with both.

A man who by a single blow with a deadly weapon killed another man, who at the dead of night was entering his room for the purpose of having criminal intercourse with his wife, was held guilty of causing grievous hurt on a grave and sudden provocation (3 W. R., 55).

Explanation.—The last two sections are subject to the same provisos as Exception 1, Section 300.

[*Any Mag.*]

[*Cog. Bailable.*
[*Summons.*]

*336. Whoever does any act (33) so rashly or negligently as to endanger human life (45) or the personal safety of others, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both. (*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

Act endangering human life or safety.—From the wording of this section there is nothing to show that personal harm must necessarily be sustained to make the offence complete, the offence is complete as soon as ever an act endangering human life and safety is rashly or negligently done. The following sections provide for cases where hurt ensues.

Plying for hire a boat which is out of order and unfit to carry passengers should be charged under Section 282, and not under this section (1 Bo. H. Ct. R., 13).

[*M. of 1st or 2nd
Class.*]

[*Cog. Bailable.*
[*Summons.*]

*337. Whoever causes hurt (319) to any person (11) by
s

Causing hurt by an act which endangers life or the personal safety of others. doing any act (33) so rashly or negligently as to endanger human life (45) or the personal safety of others, shall be punished with imprisonment of either description (53) for a term which may extend to six months, or with fine which may extend to five hundred rupees or with both. (*Triable summarily* under Section 222, C. C. P.)

[*M. of 1st or 2nd Class.*]

[*Cog. Bailable.*
[*Summons.*]]

*338. Whoever causes grievous hurt (320) to any person (11) by doing any act (33) so rashly or negligently as to endanger human life (45), or the personal safety of others, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Causing grievous hurt by an act which endangers life or the personal safety of others.

WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

"Next to personal security the law in England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct; without imprisonment or restraint, unless by due course of law. In England these rights cannot be abridged at the mere discretion of the Magistrate, without the explicit permission of the laws" (1 Black. Com., 121).

Even if what the restrainer seeks is good and just otherwise, if sought by force or fraud, it becomes bad and unjust, the maxim laid down being "*quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.*"

339. Whoever voluntarily (39) obstructs any person (11) so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Wrongful restraint.

Exception.—The obstruction of a private way over land or water, which a person (11) in good faith (52) believes

himself to have a lawful right to obstruct, is not an offence (40) within the meaning of this section.

Illustration.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

By wrongful restraint is meant the keeping a man out of a place where he wishes to be, and has a right to be. Wrongful confinement, which is a form of wrongful restraint, is the keeping of a man within limits out of which he wishes to go, and has a right to go. The offence of wrongful restraint, when it does not amount to wrongful confinement, and when it is not accompanied with violence or the causing of bodily hurt, is seldom a serious offence, and therefore to be visited with a light punishment (Law Commissioners' Report, Note M., 107).

Where a police officer refused to let a person go home until he had given bail, he was held to have been guilty of wrongful restraint under this section (10 W. R., 20; Sheo Sauren Sahoi v. Mohamed Fazil Khan).

*340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine that person."

By English law, to constitute the injury of false imprisonment two points are requisite: (1) the detention of the person, and (2) the unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority; false imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday (3 Black. Com., 136).

By Financial Department No. 1120, dated 20th February, 1868, under the provisions of Section 2, Act XVIII of 1865, the Governor-General in Council sanctioned the exemption from stamp duty of petitions and applications above named, when such were presented to any Criminal Court by Government officers in their public capacity.

A, a Police Officer, while investigating a case, is wrongfully confined. By Article 10, Schedule B, Act XXVI of 1867, he would have had to present his petition of complaint on a one rupee stamp. By Notification No. 1120 he was exempted from stamp duty. This provision was enacted in Section 19, Clause XVIII, Act VII of 1870. And by the Court Fees' Act, the stamp for the public is reduced to eight annas. Section 18, Act VII of 1870, runs as follows:—"When the first or only examination of a person who complains of the offence of wrongful confinement, or of

wrongful restraint, or of any offence other than an offence for which Police Officers may arrest without warrant, and who has not already presented a petition on which a fee has been levied under this Act, is reduced to writing under the provisions of the Code of Criminal Procedure, the complainant shall pay a fee of eight annas, unless the Court thinks fit to remit such payment."

The offence of wrongful confinement may be a slight offence, but when attended by aggravating circumstances it may be one of the most serious that can be committed. One aggravating circumstance is the duration of confinement, another aggravating circumstance is the circumstance that the offender persists in wrongfully confining a person, notwithstanding an order issued by a competent authority for the liberation or production of that person; a third aggravating circumstance is the circumstance that the offender uses criminal confinement for the purposes of extortion. For all these aggravated forms of wrongful confinement severe punishments are provided (Law Commissioners' Report, Note M., 107).

Where a Superintendent of Police illegally wrote to a person, telling him to appear before the Magistrate, and at the same time sent constables to accompany him with orders to prevent his speaking to any one—*held*, that this amounted to wrongful confinement (2 Mad. H. Ct. R.).

Illustrations.

(a.) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b.) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

[Any Mag.]

[Cogn. Bailable.]
[Summons.]

*341. Whoever wrongfully restrains (339) any person (11) shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under Section, 225, C. C. P.; also under Section 222, C. C. P.)

[M. of 1st or 2nd
Class.]

[Cogn. Bailable.]
[Summons.]

*342. Whoever wrongfully confines (340) any person (11) shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

If a Police Officer detain a person for a single hour, except on reasonable ground, justified by the circumstances of the case, he is guilty of wrongful confinement, and is not protected by Section 124, C. C. P.

A short duration of confinement may be so harmless as not to amount to an offence; in such cases Chapter IV, Section 95, should be taken into consideration. The Law Commissioners say that section is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent.

For a charge of wrongfully detaining for more than twenty-four hours to hold good, it must be proved that the detention was continuous (1 W. R. C. R., 5).

[*M. of 1st or 2nd Class.*]

[*Cog. Bailable.*]
[*Summons.*]

*343. Whoever wrongfully confines (340) any person (11) for three days or more shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

[*Ct. of S. or M. of 1st or 2nd Class.*]

[*Cog. Bailable.*]
[*Summons.*]

*344. Whoever wrongfully confines (340) any person (11) for ten days or more shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

Under this section fine alone is not a legal punishment (1 Bo. II. Ct. R., 39).

[*Ct. of S. or M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*345. Whoever keeps any person (11) in wrongful confinement (340), knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of

imprisonment to which he may be liable under any other section (50) of this Code.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.*
[*Summons.*]

*346. Whoever wrongfully confines (340) any person (11) in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant (21), or that the place of such confinement may not be known to, or discovered by, any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description (53) for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.*
[*Summons.*]

*347. Whoever wrongfully confines (340) any person (11) for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security (30), or of constraining the person confined, or any person interested in such person, to do anything illegal, or to give any information which may facilitate the commission of an offence (40), shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

See note under Section 348 *post* as to meaning of the word "constraining."

A Deputy Magistrate has no power to dismiss, in default of prosecution, a charge laid under this section. Where the evidence of a prosecutor and his witnesses is taken in the presence of the accused, and the case is postponed by the Court for the evidence of witnesses for the defence, the case ought not to be dismissed for default of the prosecution if on the day to which it has been postponed the prosecutor is not present (12 W. R., 27).

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Bailable.
[Summons.]*]

*348. Whoever wrongfully confines (340) any person (11) for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence (40) or misconduct, or for the purpose of *constraining* the person confined, or any person interested in the person confined, to restore, or to cause the restoration of any property or valuable security (30), or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Of constraining.—This and the preceding section contain in the latter portion the act of *constraining* a person to do something as different to *extorting* certain confessions or information. This appears to be for the sake of making the section more comprehensive, so that if extortion cannot literally be proved, the compelling against the sufferer's consent is equally a crime. Sections 327, 329, 330, and 331 *ante* have similar provisions.

ON CRIMINAL FORCE AND ASSAULT.

Injuries affecting the person, says Blackstone, "may be committed by threats, assault, battery, wounding, and mayhem, by threats and menaces of bodily hurt, through fear of which a man's business is interrupted." A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong they must be both of them together. The remedy for this is twofold. The party menaced may either apply to a magistrate to have the offender bound over in recognizances to keep the peace towards the complainant, or he may sue for damages in a civil suit (3 Black. Com., 126).

The injuries above-mentioned are all in their nature direct, there are others which in contradistinction may be termed *consequential*, as resulting occasionally, although not necessarily, from wrongful acts or neglects. The personal injuries which may be considered consequential only, are such generally as arise from the neglect or default of others in the per-

formance of the duties they have undertaken to discharge. Thus, if a passenger is injured by the want of care of the driver of a coach, or a person sustains an injury owing to the negligence of a carman, the owner of the coach in the former, and the carman's master in the latter case, will be liable in an action for damages. If, on the other hand, the above men did the injury *wilfully*, they and not the owner of the coach or master of the carman will be liable (3 Black Com., 129).

349. A person (11) is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any such substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling : Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

Force. *Firstly.* By his own bodily power.

Secondly. By disposing any substance in such a manner that the motion, or change or cessation of motion, takes place without any further act on his part, or on the part of any other person.

Thirdly. By inducing any animal to move, to change its motion, or to cease to move.

350. Whoever intentionally uses force (349) to any person (11) without that person's consent, in order to the committing of any offence (40), or intending illegally by use of such force to cause, or knowing it to be likely that by the use of such force he will illegally cause, injury (44), fear, or annoyance to the person to whom the force is used, is said to use criminal force to that other.

The Law Commissioners refer to the definition herein given as follows :—"We have found great difficulty in giving a definition, and are by no means satisfied with that which we now offer. As, however, it at present appears to us to include all that we mean to include, and to

exclude all that we mean to exclude, we have adopted it in spite of the objections which we feel to its harsh and quaint phraseology. We have adopted it with the less scruple, because we trust that the illustrations will render every part of it intelligible to an attentive reader." The term herein defined in this Section 350 includes what is termed by English law "battery."

The old Section 350 provided that whoever intentionally used force to any person without his consent, intending thereby to cause fear or annoyance to such person, was said to use criminal force. This obviously made it penal for a schoolmaster, in the reasonable exercise of his discretion, to flog one of his scholars who happened to be over twelve years of age. Mr. Stephens in his Bill, Act XXVII of 1870, amended the old section by inserting the word "*illegally*" before the words "*the cause,*" and this is in conformity with the English law, for by that law battery is justifiable or lawful in the cases of a parent or master giving moderate correction to his child, his scholar, or his apprentice (3 Black. Com. 127).

Illustrations.

(a.) Z is sitting on a moored boat on a river. A unfastens the mooring, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear, or annoyance to Z, A has used criminal force to Z.

(b.) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, A has committed criminal force to Z.

(c.) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z; and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(d.) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, he has used criminal force to Z.

(e.) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water and dash up the

water against Z's clothes or something carried by Z. Here, if the throwing of the stone produced the effect of causing any substance to come into contact with Z or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he used criminal force to Z.

(f.) A intentionally pulls up a woman's veil. Here A intentionally uses force to her; and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy her, he has used criminal force to her.

(g.) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally, by his own bodily power, causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has therefore intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear, or annoyance to Z, A has used criminal force.

(h.) A incites a dog to spring upon Z without Z's consent. Here, if A intends to cause injury, fear, or annoyance to Z, he uses criminal force to Z.

(i.) "A, a schoolmaster, in a reasonable exercise of his discretion as master, flogs B, one of his scholars. A does not use criminal force to B, because, although A intends to cause fear and annoyance, he does not use force illegally."

351. Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person (11) present to apprehend that he who makes that gesture or preparation is about to use criminal force (350) to that person, is said to commit an assault.

Assault.

Blackstone, in defining assault under the English law, says, "it is an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him: this is an assault, *insultus*, which Finch describes to be an unlawful setting upon one's person, and though no actual suffering is proved, yet the party injured may have redress by action for damages as a compensation for the injury" (3 Black. Com. 127).

Besides those limbs and members that may be necessary to a man in order to defend himself to annoy his enemy, the rest of his person or body is also entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member (see remarks to Section 299, P. C.).

By English law, an action of trespass lies, and an indictment may be

laid as well as an action brought for assault; but if after a summary conviction before two magistrates, the offender who has been convicted pay full amount of fine and costs, or undergo imprisonment, or obtain a certificate dismissing the complaint, he is released from further proceedings, civil and criminal go in the same cause.

It has been ruled by High Court, Calcutta, that compounding an assault for money consideration under a bond is admissible, and an action legally to enforce the contract is maintainable.

If a person who has reason to believe he will be attacked, courts the attack, he will not be acquitted, on the plea that he acted in self-defence (2 R. J. P. J., 118).

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Illustrations.

(a.) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b.) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c.) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

[Any Mag.]

[Uncog. Bailable.]
[Summons.]

*352. Whoever assaults (351) or uses criminal force (350) to any person (11) otherwise than on grave provocation, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both. (*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

53 Geo. III, Chap. 155, Sec. 105, gave Justices of the Peace jurisdiction in cases of assault and trespass committed by European British subjects on natives of India, and the above section was extended by Act VII of 1853 to any part of the said territories under the Government of

the E. I. Company, with certain exceptions, and gave jurisdiction in the above-mentioned cases committed by European British subjects or other person against the person or property of any person whatever. 53 Geo. III, chap. 55, sec. 105, and VII of 1853, are repealed by Part II, Schedule I to Act X of 1872. Her Majesty's Commissioners in their 7th Report, page 5, say "they concur with the Commission which framed the Code (C. C. P.), in thinking it desirable that a general and uniform system of Criminal Procedure should be applied to persons of all classes without distinction," European British subjects, as well as Her Majesty's native subjects.

Certain unrepealed sections of 9 Geo. IV, chap. 74, relate to the summary jurisdiction of Justices of the Peace. For a full and lucid account, see Atkinson's C. C. P., App. B., 41 to 80.

The unlawful beating of another is termed, in English law, "*battery*." The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner (3 Black. Com., 127). *Wounding* consists in giving another some dangerous hurt, and is only an aggravated species of battery (*Id.*, 128).

A person who is tried and discharged for the offence of assault under this section, cannot again upon the same complaint, be tried for "*causing hurt*." In *re R. v. Dwarka Nath Dutt*, the point of *autre fois acquit* is fully discussed. In that case Sir Barnes Peacock made the following observation "when it is said that the offences must be the same, it is merely meant that they must be in reality the same" (7 B. L. R., App. 25).

Compounding a private misdemeanour, such as an assault, for money consideration, under a bond, is admissible, and an action legally to enforce the contract is maintainable (1 R. C. C. R., 19).

If A direct his servant to assault B, and the servant do so in consequence of the order, master and servant are liable, the former under Section 109, and the latter under this section. If A were present superintending the assault, he would be liable as a principal (*vide* Section 114 *ante*).

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence (40) under this section, if the provocation is sought or voluntarily (36) provoked by the offender as an excuse for the offence; or

If the provocation is given by anything done in obedience to the law, or a public servant (21) in the lawful exercise of the power of such public servant; or

If the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact. (See *ante*, 95.)

[*M. of 1st or 2nd
Class.*]

[*Cog. Bailable
[Warrant.]*]

*353. Whoever assaults (351) or uses criminal force (350) to any person (11) being a public servant (21) in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

[*M. of 1st or 2nd
Class.*]

[*Cog. Bailable.
[Warrant.]*]

*354. Whoever assaults (351) or uses criminal force (350) to any woman, intending to outrage, or knowing it to be likely that he will thereby outrage, her modesty, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both (*or with* whipping in addition to, if previously convicted of the same offence, VI. 4).

Indecent Assault—Character of Prosecutrix—Irrelevant Evidence.—The two prisoners had been indicted at the Surrey Quarter Sessions on a charge of indecently assaulting a female. The prosecutrix in her cross-examination was asked if she had ever had connection with A, and she denied the imputation. The counsel for the defence called A as a witness, and was proceeding to ask him whether he had ever had connection with the prosecutrix, when the counsel for the prosecution objected to this line of questioning, and the Chairman of the Court refused to allow the evidence to be taken. The prisoners were found guilty, subject to a special case, the question being whether the above evidence for the defence was properly rejected.

The Court (Kelly, C. B., Pigott, B., Byles, J., Lush, J., and Hannen, J.) affirmed the conviction. The question put by the prisoners' counsel to the prosecutrix was legitimate; but on her replying to the question in the negative the prisoners were bound by her answer, and could not call any evidence to show that she had ever had intercourse with another

man. To do so would be to raise an issue entirely irrelevant to the charge, and the evidence was therefore properly rejected.

Insult offered by words or gesture is punishable by Section 509 *post*.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

***355.** Whoever assaults (351) or uses criminal force (350) to any person (11), intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Assault or criminal force with intent to dishonour a person, otherwise than on grave provocation.

It is essential to constitute a criminal assault that it should be *in invitum*, not consenting and participating parties, such an offence would be punishable under Section 377 *post*.

[*Any Mag.*]

[*Cog. Not bailable.
[Warrant.]*]

***356.** Whoever assaults (351) or uses criminal force (350) to any person (11), in attempting to commit theft (378) on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description (53) for a term which may extend to two years or with fine, or with both.

Assault or criminal force in attempt to commit theft of property carried by a person.

This section provides a separate punishment for the rare case of criminal force used in attempt at theft, and yet not amounting to robbery; the punishment under this section may, I think, be superadded to that for attempt at theft (J. C., O., Mr. G. Campbell; Cir. 54 of 1862, p. 81 of printed Circulars).

[*Any Mag.*]

[*Cog. Bailable.
[Warrant.]*]

***357.** Whoever assaults (351) or uses criminal force (350) to any person (11), in attempting wrongfully to confine that person (340), shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

Assault or criminal force in attempt wrongfully to confine person.

[Any Mag.]

[Uncog. Bailab.]
[Summons.]

*358. Whoever assaults (351) or uses criminal force (350) to any person (11) on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Explanation.—The last section is subject to the same explanation as Section 352.

OF KIDNAPPING, ABDUCTION, SLAVERY, AND FORCED LABOUR.

359. Kidnapping is of two kinds; kidnapping from British India (15), and kidnapping from lawful guardianship.

This offence may be committed on a child by removing that child out of the keeping of its lawful guardian or guardians. On a grown man it can only be committed beyond the limits of the Company's (*Queen's*) territories, or by receiving him on board a ship for that purpose. The enticing a grown-up person by false promises to go from one place in the Company's (*Queen's*) territories to another place also within those territories may be a subject for civil action, and under certain circumstances for a criminal prosecution, but it does not come under the head of kidnapping (Law Commissioners' Report, Note M., 108).

In the Oudh Police Report for 1867, the Deputy Commissioner of Fyzabad observed that the Police had been successful in detecting crimes of kidnapping, but so long as Rajpoot children are made away with, and wives have to be bought by both Brahmins and Rajpoots, so long will little girls of all castes remain at a large premium and kidnapping be rife. We have in this district a regular organization consisting of—

1. The child-stealer.
2. The child-broker.
3. The money-advancer, and
4. The eventual child-purchaser, *i. e.*, the public.

And the Inspector-General of Police said "young girls" are kidnapped and brought to Oudh from other provinces solely for the purpose of marriage. Prostitution does not appear to be so much the object, and a

regular organized system exists for the instruction of the girls and their disposal. The crime is therefore fed by the more horrible one of infanticide.

The organized system above alluded to is described by the District Superintendent of Gondah as follows :—"A girl of any age from three to fourteen is purchased—the purchaser, a Thakoor, belongs to a gang of five or six others, including women, and they have accomplices in different districts. The girl is then brought by the purchaser and a female accomplice, and placed for safe keeping in the house of a friend, which is used as a sort of depot for such girls, where two or three are often housed together. The girls are carefully taught to reply to all questioners, that their owners are their parents or brothers, &c., as agreed, and whilst this is being taught them well, the owners look out for some Thakoor family, where a wife is wanted. This found, arrangements for marriage are made, the dealer demands a certain sum varying from Rs. 60 to 100. This settled, the proposed purchaser sends a Brahmin and a friend to ascertain if the girl is really the purchaser's daughter or niece, as stated by him, and these being easily deceived, the marriage is arranged. On the day of the ceremony the accomplices appear with the dealer, and a regular false family party is fabricated. The girl, with the pleasant prospect before her, acts her part to perfection, and in this manner girls of every caste—and of Mussulman parents even—are palmed off in Thakoor families, as *bonâ fide* Thakoor children and Hindoos. At present the woman found in the Rajpoot's house is very often a low caste mistress, and in some of the Hill States, where they have not the same facilities as the Rajpoots in the plains for procuring by illegal means wives from depots as above described, the practice of polyandria is said to exist. In August 1866 the Gondah Police seized five girls who had been kidnapped from the Gazepoor District, and sold to Thakoor families in marriage in Gondah, and from information gained from these girls, and the parties who were convicted of having bought them, a rigorous inquiry was set on foot, which resulted in forty more cases being brought to light, and the District Superintendent of Gondah reported that to his certain knowledge "the traffic was extensive in the Gondah and Fyzabad Districts, and that no doubt the deficiency which existed of female children in Thakoor families caused this necessity. In the Bustee District a regular depot was discovered, where girls were collected, after they had been either kidnapped or bought, previous to the families being fixed upon into which they were to be drafted by sale.

Part I, p. 523, of the *Gazette of India* of 11th May, 1872, contains Government Notification 310 Police, in which his Excellency the Governor-General in Council confirms, under Section 3, Act VIII of 1870, certain rules submitted for sanction by the Chief Commissioners of Oudh, for the prevention of the murder of female infants.

360. Whoever conveys any person (11) beyond the limits of British India (15) without the consent of that person, or of some person legally authorized to consent on behalf of

Kidnapping from British India.

that person, is said to kidnap that person from British India.

361. Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person ^{Kidnapping from lawful guardianship.} (11) of unsound mind, out of the keeping of the lawful guardian of *such minor* or person of unsound mind, *without the consent* of such guardian, is said to kidnap such minor or person from *lawful guardianship*.

Under the English law the offence of child-stealing is a felony. The punishment for every such offence, and for every person counselling, aiding, and abetting him, is penal servitude for four years, or imprisonment, with or without hard labour, for any term not exceeding two years (4 Black. Com., 247).

Of such minor.—This much is clear, that for the purposes of this section a *minor* is a male under fourteen years of age, and a female under sixteen years of age. Would that the definition of a minor were as plain with reference to at what age a person becomes his own master, and when his consent is material as to contracts and loans. One of the latest Acts in which the term “minor” is defined is Act VIII of 1871, the Indian Registration Act, and that defines him as “a person who, according to the personal law to which he is subject, has not attained majority.” This surely leaves the vexed question as incomplete as before. And Act IX of 1872 in no way clears up this difficulty; for Section 2 of that Act lays it down that “every person is competent to contract who is the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.” Cowell, in his seventh Lecture on Hindoo Law, pp. 173-181, discusses this question, and towards the conclusion of summing up, remarks, “As a general rule, it may be said that no one domiciled in British India can say with absolute certainty at what particular date his disabilities cease, and when in the eye of the law his responsibilities commence.” It is bad enough to see painful and very personal correspondence on this question of age as issues of *fact* in cases of native gentlemen presenting themselves for the Competition Examination in the Civil Service, and things are hardly made better by the Legislature leaving it very doubtful as to the age at which a person became *sui juris*. Why should the law in India not be as clear on this point as it is in England?

Section 8 of the Punjab Laws Act 1871, lays down “the period of legal minority of persons of all trades and classes, and of both sexes, shall be the age of eighteen years, according to the British Calendar.”

Without the consent.—Under this section the consent of the girl is immaterial, and neither force nor fraud form elements of the offence, as they do under Section 362 (2 W. R. C. C., 5; see also 3 W. R., 9).

Though the consent of the child is immaterial, it must be borne in mind that the non-consent of the lawful guardian is a material point, for there can be no conviction unless it is proved that the accused has taken the infant out of the keeping or custody of its lawful guardian, *without the guardian's consent* (16 W. R., 43).

Lawful guardianship.—Charge of kidnapping from lawful guardianship cannot be sustained in case of a runaway, enticed after a voluntary abandonment of her home to emigrate (5 R. J. P. J., 152).

Charge of kidnapping from lawful guardianship sustainable even when the child has been betrothed to the offender (5 R. J. P. J., 149).

Charge of kidnapping from lawful guardianship should contain the name of the guardian (par. 3, Letter No. 154, 20 February, 1866; 1 R. C. C. R., 16, from Registrar High Court, Calcutta).

Explanation.—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person (11).

Exception.—This section does not extend to the act (33) of any person (11) who in good faith (52) believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

362. Whoever by force (340) compels, or by any deceitful means induces, any person (11) to go from any place, is said to abduct that person.

Abduction.

By Statute 24 and 25 Vic., cap. 100, Sec. 96, “whoever shall take or cause to be taken any unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.” Prisoner was tried under the above section before Lush J. It appeared that the prisoner met in the street at Ashton a girl under the age of sixteen, who was living with her parents in that town. She was in company with another girl, and the prisoner took both of them by train to Manchester, where he seduced the girl first mentioned. He then took them back to Ashton, and left them at the place where he had first met them. There was nothing to show that prisoner knew who the girl was, or whether she had any parents living. The Court quashed the conviction. It could not be assumed that the prisoner knew, or could know, that the girl was under the charge of her parents or of any one else. There was, therefore, no proof of a “taking out of the possession” of her parents,

which was a necessary element in the offence anticipated by the statute (M. J. 225, June, 1869).

In *Reg. v. Twisleton*, it was held that it is no excuse that the defendant being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of the lover to induce the girl secretly to elope and marry him, if it appeared that it was against the consent of the father. In *Reg. v. Robins*, where A went in the night to the house of B, and placed a ladder against the window and held it for F, the daughter of B, to descend, which she did, and then eloped with A; F being a girl fifteen years old, this was held to be a taking of F out of the possession of her father, although F had herself proposed to A to bring the ladder and elope with him. In *Reg. v. Mankleton*, it was held that an actual possession of the father, or other person, was not necessary, and that though the girl may leave home of her own accord, still that possession continues in law, until put an end to by the accused taking the girl into his own possession. Held ditto in *Reg. v. Kipps*. By a mere temporary absence, as in the case of a visit, the father's possession would not be broken; whereas if she were sent to school, or the like, she would then be in possession of a person having lawful care or charge of her, which care or charge is protected by statute. In *Reg. v. Handley*, the want of consent of the father must be presumed, if it appears that had he been asked, he would not have consented. In *Reg. v. Hopkins*, where A induced the parents of a girl between ten and eleven years old to allow him to take her away, on pretence of placing her in the service of a lady; held that such taking was abduction. This is in accordance with the general principle that consent obtained by fraud avails nothing. In *Reg. v. Robins*, where the offence depends upon the age, this must be proved in the usual way by the girl herself, or any person who can speak to the date of her birth. Held to be no defence that prisoner did not know that the girl was under sixteen (*Roscoe*, 6th Edition, 246, 247, 248).

A warrant for the arrest of a person on a charge of abduction should state the intent with which the offence was committed; there is no such offence as abduction under the Penal Code, but abduction with certain intent is an offence. Warrants, therefore, without stating the offence are accordingly bad (*Bidhoomooke Dabi v. Sreenath Halder*, 15 W. R. 4).

A conviction of abduction quashed, no force or deceit having been practised on the person abducted (*Queen v. Komul Doss*, 2 W. R. Cr. 7).

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Not bailable.*
[Warrant.]]

*363. Whoever "kidnaps any person from British India" (360) or from lawful guardianship (361), shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Punishment for kidnapping.

By Section 19, Act V of 1871, the Local Government may authorize

the reception, detention, or imprisonment in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council is one of the presiding Judges.

Whoever, except under and in conformity with the provisions of Act VII of 1871 (Emigration Act), makes any contract with any Native of India for labour to be performed in any place beyond British India to which emigration is not authorized under the above-mentioned Act, shall be deemed to have committed the offence specified in this section (*vide* Section 71, Act VII of 1871). And whoever knowingly enables or assists any native of India to emigrate to any such place, or aids in or abets the emigration of any native of India to any such place, shall be deemed to have abetted the commission of that offence (*id*). All prosecutions under Act VII of 1871, shall be instituted in information laid at the instance of an emigration agent, or of a protector of emigrants, or of an officer appointed for the purpose by the Local Government before a Magistrate of Police, or before a Magistrate, according as they shall be instituted for offences committed within or beyond the limits of the towns of Calcutta, Madras, or Bombay. All fines imposed under Act VII of 1871, may be recovered if for offences outside the limits of the above-mentioned towns in the manner prescribed by the Code of Criminal Procedure, and if for offences committed within those limits in the manner prescribed by any Act regulating the police of such towns in force for the time being (Section 82, *id*).

The word Magistrate in the above Act denotes any officer exercising the full powers of a Magistrate and in charge of a district, a division or a sub-division of a district (Section 3, *id*). The Local Government may from time to time authorize any person invested with the powers of a Magistrate as defined in C. C. P., to exercise the powers of a Magistrate of the district under this Act (Section 85, *id*).

The offence described in this section is included in the offence described in Section 369, P. C. (8 W. R., 35). Section 361 distinctly provides for the offence of abducting a *minor* under 16 years, as a "kidnapping from lawful guardianship."

There is nothing illegal in passing separate sentences for the offences of kidnapping and of selling for purposes of prostitution (3 R. C. C. R., 37).

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*364. Whoever kidnaps (359) or abducts (362) any

Kidnapping or abducting in order to murder. person (11) in order that such person may be murdered (300), or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(a.) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b.) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*365. Whoever kidnaps (359) or abducts (362) any person (11) with intent to cause that person to be secretly and wrongfully confined (340), shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting with intent secretly and wrongfully to confine a person.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*366. Whoever kidnaps (359) or abducts (362) any woman (10) *with intent* that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person (11) against her will, or in order *that she may be forced* or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting a woman to compel her marriage, &c.

With intent that she may be forced, &c.—To sustain a charge under this section of abducting a woman with intent that she be forced or seduced to illicit intercourse, there must be evidence to show the intent, or to raise the presumption that illicit intercourse was likely to result from the abduction (3 P. R., 68).

Vide note to Section 359 *ante* as to the relation female infanticide has

to kidnapping. There can be no conviction of the offence of kidnapping under this section, unless it is proved that the accused has taken the child out of the keeping or custody of its lawful guardian, without the guardian's consent.

Where a procuress induced a married woman, aged 26, to leave her husband—and the facts showed that the wife “had made her deliberate choice, and was determined of her own free will to leave her husband and become a prostitute in Calcutta”—Bengal High Court *held* that no conviction could be sustained under this section, but there was quite sufficient evidence to convict the prisoner of enticing, under Section 498, “for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interposed (1 W. R. C. C., 45).

[*Ch. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*367. Whoever kidnaps (359) or abducts (362) any person (11) in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt (320) *or slavery*,* or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting in order to subject a person to grievous hurt, slavery, &c.

Vide note in re Sikundur Bhukut under Section 368 *post* what is here meant by the term *slavery* in this section, and *disposing of a person as a slave* in Section 370 *post*, and *habitually dealing in slaves* in Section 371 *post*. The Chapter of Explanations contains no definition of either the words *slave* or *slavery*. Mr. Hargrave in his argument in *Sommersett's case* said, “Slavery has been attended in different countries with circumstances so various as to render it difficult to give a general description of it. The Roman lawyer calls slavery a constitution of the law of nations, by which one is made subject to another contrary to nature. But this is mistaking the cause for the effect. Grotius describes slavery to be an obligation to serve another for life, in consideration of being supplied with the bare necessities of life. There are, however,” says Mr. Hargrave, “certain properties which have accompanied slavery in most places. Slavery always imports an obligation of perpetual service, an obligation which only the consent of the master can dissolve. It generally gives to the master an arbitrary power of administering every sort of correction. It creates an incapacity of acquiring except for the master's benefit. It allows the master to alienate the person of the slave in the same manner as other property. Lastly, it descends from parent to child, with all its severe appendages. This description agrees with almost every kind of slavery, formerly or now existing, except only that remnant of

ancient slavery which still lingers in some parts of Europe, but qualified and moderated in favour of the slave by the humane provision of modern times."

The subject of slavery is dealt with by the Law Commissioners in note B to their draft of the original Penal Code, 22 to 25, and in their First Report on the Penal Code, 127 to 129.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*368. Whoever, knowing that any person (11) *has been kidnapped* (359), or *has been abducted* (362), wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge or for the same purpose as that with or for which he conceals or detains such person in confinement.

Has been kidnapped.—This Section 368 refers to some other party who assists in concealing any person who has been kidnapped, and not to the kidnappers (6 W. R., 17).

Wrongfully conceals or keeps.—It is not altogether an easy matter to define in general terms what would constitute the sort of concealment contemplated by this section. The proved facts of each case alone will make out to a Judge or Jury if there has been concealment. The High Court N. W. P., in *re R. v. Mirza Sikundur Bhukut*, ruled—"If, knowing a girl has been kidnapped, a person wrongfully confines her, and subsequently detains her as a slave, he is guilty of two separate offences, punishable under the Indian Penal Code. Slavery is a condition which admits of degrees; absolute slavery may be defined as a state where not only liberty of action must be denied to a person, but a right also be asserted to dispose of his life, his labour, and his property; nevertheless, a person is treated as a slave if another asserts an absolute right to person restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or jailor" (3 H. C. N. W. P. R., 149). As the status of slavery is not recognized by our laws, there can be no such thing as a slave *de jure* in British India. But there can be no doubt that the insertion of Section 370, Penal Code, implies a belief on the part of the Legislature that there may be in British India slaves *de facto* who are not so *de jure*. The question arises, what is the condition that constitutes such a slave? There is no definition of "slavery" in the Penal Code. At Section 370 *post* I have quoted the definition given by Blackstone. This definition is vague to begin with, and its applicability to British India is doubtful. To be slavery, it must be such a state as comes within the description of "civil relation." But a civil relation is essentially a relation *de jure*. It is a relation recognized as arising lawfully out of certain circumstances. A definite decision on this important point is much needed. The *Cal-*

cutta Englishman had an article on this subject, *vide* the number for 13th March, 1872.

The H. C. N. W. P. *held* that the mere fact of a girl being received into a house, and retained there by the owner, even after he may have become aware, or found reason to believe that she had been kidnapped, does not amount to concealment of her unless an intention of keeping her out of view be apparent (5 N. W. P. H. C. R., 133 and 189).

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*369. Whoever kidnaps (359) or abducts (362) any child under the age of ten years with the intention of taking dishonestly (24) any movable property from the person of such child, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

The offence described in Section 363, P. C., is included in that described in Section 369, P. C. (8 W. R., 35; *Queen v. Shama Sheikh*).

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*370. Whoever imports, exports, removes, buys, *sells*, or *disposes of any person as a slave*, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Sells or disposes of as a slave.—A bought a girl from B, her mother, a Charmarin, and gave her to C, a Thakoor, for marriage to his son, in consideration of the sum of ten rupees, A having represented to C that the girl was a Thakoorain. A and B were both convicted of selling the child as a slave under Section 370, P. C. It was held that this conviction was right in respect to B, who had sold the child to A, unreservedly; but it was wrong with regard to A, because the Asara form of marriage, the characteristic of which, according to Strange, is the payment of money by the bridegroom to those who gave the bride away, is acknowledged among Hindoos. To give a girl away in marriage, therefore, under such circumstances, is not equivalent to selling her as a slave. It was pointed out, however, that A, in having represented to C that the child of the Charmarin was a Thakoorain, was guilty of cheating, and the punishment which had been awarded to him for selling the child as a slave was allowed to stand,

this charge only being altered from Section 370 to 417 of the Code (Book Circular $\frac{1}{2}$ of 1865, J. C. O.).

A slave.—*Vide* note under Section 368 *ante*, in *re R. v. Sikundur Bhukut*. . . . There is no definition of the words *slave* or *slavery* in the Indian Penal Code. The definition of slavery, according to Blackstone, is that “civil relation, in which one man possesses absolute power over the life, liberty, and fortune of another.” Such a state of things does not and cannot subsist in England, or in British territory. This and the following section would appear to have been framed to meet the case of persons dealing with slaves in connection with a foreign territory, where slavery obtains.

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*371. Whoever habitually imports, exports, removes, buys, sells, traffics, or deals in slaves, shall be punished with transportation for life, or with imprisonment of either description (53) for a term not exceeding ten years, and shall also be liable to fine

[*Ct. of S. or M. of*
1st Class.]

[*Cog. Not bailable.*
[*Warrant.*]

*372. Whoever sells, lets to hire, or otherwise disposes of any minor under the age of sixteen years, *with intent* that such minor shall be employed or used *for the purpose of prostitution* or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Whoever sells, lets to hire, &c.—It matters not how possession of minors may have been obtained (8 W. R., Letter 748 of 1867). And this offence may be committed by parents, guardians, and other persons having a lawful charge or custody of minors. But “letting to hire” implies an active agency on the part of the procuress or person “letting.” Where a girl practises prostitution and out of what she makes by her trade keeps her parent or guardian, the receipt of the girl’s charity does not bring the parent or guardian under the provisions of this Section (7 P. R., 38).

With intent.—*Vide R. v. Nourjan and Jagat Tara*, Criminal Appeal, No. 401 of 1870, H. C. C. VI, B. L. R., where Judges Jackson and Glover differed on a point of law, in a case decided and punished under this section. Jackson, J., held this section contemplated the selling, letting

to hire, or otherwise disposing of any minor with intent that such minor should be employed as stated, that is to say, making over to a person either in perpetuity, or for a term, for a consideration, or otherwise transferring the possession of a minor.

[*Ct. of S., or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*373. Whoever buys, hires, or otherwise obtains possession of any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

The person aimed at in this section is the "other party" to the transaction in the preceding Section 372. The language at the opening of this section—*viz.*, "Whoever buys, hires, or otherwise obtains possession," &c.—is to be read as equivalent to "Whoever by buying, hiring, or other similar transactions, obtains possession," &c. It is the *trafficking* in minors for certain purposes that the law prohibits in this place. The Madras H. C. Full Bench have *ruled*, that to bring a case within this section it is essential "to show that the possession of the minor has been obtained under a distinct arrangement come to between the parties, that the minor's person should be for some time completely in the keeping and under the control and direction of the party having possession whether ostensibly for a proper purpose or not (5 M. H. C. R., 473). This ruling was followed by the Punjab Chief Courts in *R. v. Mohubut* (8 P. R. Cr. J., 16).

Vide note under Section 368 *ante* (*in re R. v. Sikundur Bhukut*).

Used for the purpose of prostitution.—The law as contained in this and the preceding section is undoubtedly condemned by public sentiment, and is set at naught in daily practice. Hiring out girls for the purpose of prostitution under the age of sixteen is a notorious custom in this country. If these sections are intended to apply to the children of prostitutes it has hitherto been nugatory, and will continue so, for the age of sixteen is an advanced age to be either unmarried or still a virgin in India. The Mahomedan law considers age simply in connection with puberty, and assigns the age of nine and seventeen as the boundaries (*vide* Grady's Hedaya). The intention of the legislature in framing these sections probably was to protect girls of a tender age from involuntary prostitution, and to enable them to reach an age untarnished, at which they might be capable of forming an opinion on the subject and choosing their own career (*in re Government v. Jodha and Musst Jodho*). The J. C. O. held that when a man passes the night with a female, whom he has hired for

the purpose, he commits fornication, but she commits fornication and prostitution too; while she is lying with him she is employed in prostitution, and he is using her as a prostitute. And *in re Government v. Kazim Ali and Musst Rain* in reply to the following questions. A, the daughter of a prostitute, has attained the age of puberty, but is under the age of sixteen. Her mother, B, let her on hire to C for the purpose of prostitution, and C hires her for this purpose and has sexual intercourse with her. Has B committed the offence defined in Section 372, I. P. C., and has C committed the offence defined in Section 373, I. P. C.? The J. C. replied that from the ruling above quoted, C in this case now put must be technically held to have committed the offence defined in Section 373, I. P. C., if he knows that A was under sixteen years of age, but if there was any doubt as to the knowledge on this point the doubt should be given in C's favour.

Obtains possession for any unlawful and immoral purpose.—Held that the tribunal to try an offence under Section 373 P. C., the charge being the *act* of “purchase or acquisition of the minor for an immoral purpose,” was the Court having jurisdiction in the place in which the purchase or acquisition was made, and not the Court having jurisdiction in the place of subsequent retention in another district (6 N. A., N. W. P., Part II, 131).

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

*374. Whoever *unlawfully* compels any person to labour against the will of that person (11), shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Unlawful compulsory
labour.

Unlawfully.—The word “unlawfully” in this section applies both to the persons compelled and the means resorted to.

OF RAPE.

The English law makes it a necessary ingredient in the crime *raptus mulierum*, or the carnal knowledge of a woman forcibly against her will, that it *must be against the woman's will*. To carnally know and abuse any girl under ten years is a felony, punishable in the same manner as rape. The law of England holds it to be a felony to force even a harlot, because the woman may have forsaken that course of life; as the essence of the crime is the forcible violation of the woman, it may be committed on any one who resists on the particular occasion, whatever may be her general conduct. All persons present assisting him who actually perpetrates the offence, as by holding the woman, or preventing her crying out, are principals; and all accessories *before* the fact may be indicted, tried, and

punished as principals, while accessories *after* the fact are guilty of a misdemeanour at common law.

The party ravished may give evidence upon oath, and is in law a competent witness. If the rape be charged to be committed on an infant, she may still be a competent witness, if she has sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie. A charge can only be sustained when the offence has been committed against the will of the woman. But the law extends its protection to females under the age of 21, not only against the force, but also against the fraud of others (4 Black. Com. 235 to 241).

In France the punishment varies, according to circumstances, from imprisonment to forced labour for life (Mack. R. L., 349).

375. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Rape.

Firstly. Against her will. While she is in possession of her senses.

Secondly. Without her consent (90). When drugged or otherwise unable to give her consent, as from insanity, being an idiot, or otherwise (*vide* Chev. M. J., 703, 704.)

Thirdly. With her consent (90), when her consent has been obtained by putting her in fear of death (46) or of hurt (319).

Fourthly. With her consent (90), when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With or without her consent, when she is under ten years of age. So young that consent is immaterial (*vide* note (1) on Section 114, Penal Code.)

In the case of rape, it is a presumption of English law, not admitting of proof to the contrary, that within the age of fourteen years this particular offence cannot, by reason of physical inability, be committed (Brom., 312).

"The prisoner was convicted of rape before Kelly, C.B., at the Liver-

pool Summer Assizes, 1868. The prosecutrix and her husband were in bed together. The former was in a state between wakefulness and sleep, and was aroused by some one having connection with her. When she first became thoroughly awake she believed it to be her husband and did not resist, but in a few seconds she discovered her mistake. It was objected by the prisoner's counsel that there could be no conviction, as there was evidence of consent. Kelly, C.B., ruled that there was evidence of sufficient force to make the offence a rape, especially as the prosecutrix resisted as soon as she discovered the real state of things. The point was however reserved for the consideration of this Court.

"The case was not now argued by Counsel.

"The Court (Bovill, C.J., Channel, B., Byles, J., Blackburn, J., and Lush, J.,) quashed the conviction. The woman was not asleep at the commencement of the perpetration of the offence, and she continued to consent after she was awake. The fraud of the prisoner, though it procured the consent, was not of itself sufficient to constitute the crime of rape."

A girl is allowed in law to have attained the age of majority when the signs of puberty appear (M. M. L., 256). The following is the Mahomedan practice founded on Mahomedan law. Under the age of *seven* years, intercourse with a female is distinctly and wholly interdicted. After the *seventh* year, and from that to the ninth year, of her age, cohabitation with a wife is admissible, provided she be steady and robust and exhibit unequivocal signs of advancing pubescence. The practice as it obtains amongst Mahomedans in Bengal and Upper India, is that a man has intercourse with his wife only when she is about to menstruate for the first time. It is an established principle of English law, that "a sufficient degree of penetration to constitute rape in law may take place without necessarily rupturing the hymen," "the degree of penetration being quite immaterial." In India, proof of penetration of the vulva, without rupture of the hymen, is sufficient to substantiate a charge of rape. It has been decided in England that any introduction of the male organ within the vulva constitutes penetration. It is merely frivolous to argue as a point of law even that *complete vaginal penetration* is impossible in any infant, however young, when it is certain, from numerous recorded instances, that such penetration has been effected in children of all ages. *Held* to be improbable and physically impossible that a girl of tender age should be killed by any violence in rape and not show any external signs of violence (Chev. M. J. 671-705).

The cessation of genuine resistance on the part of the woman does not amount to consent (1 W. R. C. C., 2). Where the prisoner had connection with a girl, of weak understanding, and blind, and always remaining passive in any position she was placed, it was argued that, as there was no proof, or want of consent on the part of the prosecutrix, and as absence of consent could not be presumed against the prisoner, that he ought to be acquitted. *Held*, there was abundant evidence of the girl's mental condition, and that the prisoner had the means of knowing it; and if he knew she was unable to express either consent or dissent, it was needless

for the prosecution to prove that she was an unwilling party (*R. v. Barratt*, 9 M. J., 63). A dying declaration of a deceased person is evidence in a case of rape (1 Madras Jurist, 368).

A was convicted by District Officer of rape on a married girl who had not yet cohabited with husband. On appeal, Commissioner found that the girl was a consenting party, and therefore acquitted the prisoner of rape, but convicted him of adultery, and sentenced him accordingly. On case coming before J. C., the Commissioner's judgment was reversed for following reasons :—

1st. Because on trial for rape the accused cannot be convicted of adultery (*vide* 1 Mosley's Digest of Indian Cases, 123).

2ndly. Because the charge was not instituted by the girl's husband (*vide* Section 177, Act XXV of 1861).

It was in the power of her husband to charge the prisoner with the commission of adultery (J. C., O., Cir. No. 82, 1864).

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

The provisions of Section 63 of 24 & 25 Vic. c. 100, provide that penetration is sufficient to prove carnal knowledge; proof of actual emission unnecessary.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape.

"It is to be feared," says Dr. Chevers, "that the reservation contained in this exception, benevolent as it is, does not fully meet the evil of fatal injuries inflicted in the first act of connection" (*vide* Chev. M. J., 694).

[Ct. of S.]

[Cogn. Not bailable.]
[Warrant.]

*376. Whoever commits rape (375) shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and also be liable to fine, (*or with whipping in addition to, if previously convicted of the same offence*, VI, 4).

The following maxims, says Foderé (from Boerius), have been adopted for thirty years in Neapolitan Jurisprudence—*viz.*, that in accusation of rape there be full proof of these facts :—

(1.) That there has been constant and equal resistance on part of the person violated. (2.) That there is inequality of strength between the parties. (3.) That she has raised cries. (4.) That there be some marks

of violence present. Three questions relating to this subject have been discussed: (1.) Whether the presence of venereal disease in the female violated is in favour of or against her accusation?

If marks of disease recent, in favour of her, but it must be remembered symptoms of infection do not appear until three days after receiving it. Should appearances indicate disease of long standing, they weaken her complaint. (2.) Can a female be violated during her sleep without her knowledge? If sleep have been caused by narcotics, by intoxication, or syncope, or excessive fatigue, it is possible. (3.) Does pregnancy ever follow rape? Great diversity of opinion. "It was formerly supposed," says East, "that if a woman conceived it was no rape; it is now admitted that such an opinion has no sort of foundation" (W. L. L., 792).

By English law an infant under fourteen years old is considered incapable of committing rape, but in India any child over seven years of age can be presumed to commit rape, incapability to be proved in evidence (B. L. M., 312).

By Section 19, Act V, 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding judges.

The measure of punishment in a case of rape should not depend on the social position of the party injured, but on the greater or less atrocity of the crime, the conduct of the criminal and the defenceless and unprotected state of the injured female (6 W. R., 59. *Queen v. Jaulah Noshyo*).

A was convicted of an attempt to commit rape, and was sentenced by the Judge to rigorous imprisonment for seven years, which he commuted under Section 59 to transportation for the same term. *Held* that under Sections 376 and 511 P. C., a sentence to imprisonment for the offence committed could not be for a longer term than five years, and such sentence could not be commuted under Section 59 to transportation for a longer time (1 B. L. R., 5. *Queen v. Joseph Meriam*).

In a case of rape proof may be given of whether the woman had had previous criminal intercourse with the prisoner, or whether she had been turned out by her husband for bad conduct (N. A., Calcutta reports previous to introduction of Code).

By Section 24 of the Evidence Bill, "In trials for rape, or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute, or that her conduct was generally unchaste, is relevant."

OF UNNATURAL OFFENCES.

[Ct. of S.]

[Cogn. Not bailable.]
[Warrant.]

***377.** Whoever voluntarily (39) has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine (or *with whipping in addition to, if previously convicted of the same offence*, VI, 4).

Unnatural offences.

What has been observed about the proof of rape (see notes to Section 375) may be applied to this offence. This crime ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for if false, it deserves a punishment inferior only to that of the crime itself (4 Black. Com. 242).

The works of the older travellers nearly all contain reference to the enormous prevalence of this crime among the "Moors" of India. A section of the chapter on adultery in Halhed's Hindoo Law (p. 280) relates to "the carnal conjunction of a man with any beast" (see also 2 Ward, 179, 3rd edition).

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

CHAPTER XVII.

OFFENCES AGAINST PROPERTY OR THEFT.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan (para. 6, Circular No. 2, dated 8th April, 1864).

No *female*, or any person sentenced to *death* or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (section 7, Act VI of 1864).

By the law of England rights to public property are absolute and inherent in every Englishman. The right consists in the free use, enjoyment, and disposal of all his acquisitions, without any contest or diminution, save only by the laws of the land. The origin of property is probably founded in nature, but certainly the modification under which we at present find it, the method of conserving it in the present owner, and translating it from man to man are entirely derived from society. The laws of England are in point of honour and justice extremely watchful in ascertaining and protecting this right. So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it, not even for the general good of the whole community. If a new road, for instance, were to be made through the ground of a private person, it might perhaps be extensively beneficial to the public, but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community—for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights. In this and in similar cases the Legislature alone can, and frequently, indeed, does, interpose, and compel the individual to acquiesce by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the Legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exercise of power which the Legislature indulges with caution, and which nothing but the Legislature can perform (1 Black. Com. 125). For the acquisition of land needed for public purposes and for Companies in India, see Act X of 1870.

The framers of the Code say all the violations of the rights of property which we purpose to make punishable by this chapter fall under one or more of the following heads :—

1. Theft.
2. Extortion.
3. Robbery.
4. The criminal misappropriation of property not in possession.
5. Criminal breach of trust.
6. The receiving of stolen property.
7. Cheating.
8. Fraudulent bankruptcy.
9. Mischief.
10. Criminal trespass.

All these offences resemble each other in this, that they cause, or have

some tendency, directly or indirectly, to cause some party not to have such a dominion over property as that party is entitled by law to have.

The first great line which divides these offences may be easily traced. Some of them merely prevent or disturb the enjoyment of property by one who has a right to it. Others transfer property to one who has no right to it. Some merely cause injury to the sufferer. Others, by means of wrongful loss to the sufferer, cause wrongful gain to some other party. The latter class of offences are designated in this Code as fraudulent (see Clause 16). Every offence against property may be fraudulently committed; but theft, extortion, robbery, the criminal misappropriation of property not in possession, criminal breach of trust, the receiving of stolen property, fraudulent bankruptcy, and cheating *must* be in all cases fraudulently committed. Fraud enters into the definition of every one of these offences; but fraud does not enter into the definition of mischief or criminal trespass (Law Commissioners' Report, Note N, 110).

Feræ naturæ wild animals distinguished from *domitæ naturæ*, tame animals. *Feræ naturæ* are not while living subjects of absolute property, but a man may acquire a qualified property in them.

Per industriam, by reclaiming and making them tame by art and industry, or by so confining them that they cannot escape—e.g., deer, hares, rabbits in an enclosed warren. The property only continues so long as they remain in a man's actual possession, but ceases if they regain their liberty unless they have *animus revertendi*, as in the case of pigeons, tame hawks.

Ratione importentie on account of their inability, as when birds, &c., make nests or burrows on a man's land and have young, then he has a qualified property in the young until they can fly.

Propter privilegium, when a man has the privilege of hunting, &c. He has a transient property in them so long as they continue within his liberty, but the instant they depart from his liberty his qualified property ceases. With regard to injuries inflicted by savage animals, and the responsibility of their owners, therefore if a man be possessed of an absolutely *feræ naturæ* as a tiger, he is an insurer and responsible for any damage done by it.

378. Whoever, intending to take dishonestly (24) any
Theft. movable property (22) out of the possession (27) of any person (11) without that person's consent (90), moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving, effected by the same act which effects the severance, may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually removing it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority, either express or implied.

Illustrations.

(a.) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession, without Z's consent. Here, as soon as A has severed the tree, in order to such taking, he has committed theft.

(b.) A puts a bait for dogs in his pocket and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c.) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move A has committed theft of the treasure.

(d.) A, being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e.) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f.) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g.) A finds a ring lying on the high road, not in possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h.) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding-place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i.) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j.) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k.) Again, if A having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l.) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m.) A, being on friendly terms with Z, goes into Z's library in Z's absence, takes away a book without Z's express consent, for the purpose merely of reading it, and with the intention of returning it. Here it is probable that A may have conceived that he had Z's implied consent to use Z's books. If this was A's impression, A had not committed theft.

(n.) A asks charity from Z's wife. She gives A money, food, and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o.) A is a paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p.) A, in good faith, believing property belonging to Z to be A's own property, takes the property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

The definition of theft given in the Institutes of Justinian is as follows:—“*Furtum est contrectatio rei fraudulosa, vel ipsius rei, vel etiam usus ejus possessionisve: quod lege naturali prohibitum est admittere.*” This definition includes the term *contrectatio rei*, to show that an evil intent is not sufficient; there must be an actual touching or seizing; *fraudulosa*, with

evil intent, and *rei, usus possessionis*, to show the different interests in a thing that might be the subject of theft. LIB. IV, TIT. I, San: N. I. J., 500, only things movable could be the subject of theft (2 D., XLVII, 25).

The word *furtum* comes either from *furum* which means "black," because it is committed secretly, and often in the night; or from *fraus*: or from *ferre*, that is "taking away," or from the Greek *φῶρ*, meaning a thief, which again comes from *φίρειν*, to carry away (*id.* 500); (see also San. N. I. J., LIB. IV, TIT. I, 501).

Dealing with the property of another, contrary to the owner's wishes. Borrowing a thing and applying it to a purpose other than that for which it was lent, against the owner's wishes, was theft. A man might commit theft of his own property, *e.g.*, a debtor taking from a creditor the thing pledged to him. A person lending his aid (abetting) or planning the theft liable to an action of theft. Those under parents and masters stealing anything belonging to the person in whose power they are, commit theft, but no action can be brought because relation of parties is such that no action can arise. But if theft had been abetted, abettor was subject to action of theft. An action might be brought by any one interested in the safety of the thing, although he was not the owner. The right to bring an *actio furti* might belong to several persons at the same time, *e.g.*, the owner and the usufructuary had sufficient interest in the thing to support an action. Mere interest was not sufficient unless the thing had been delivered to or was had in possession of the plaintiff. A person, for instance, to whom a thing was due by stipulation could not bring an *actio furti* if the thing were stolen, he could only compel the actual owner to allow him to bring an *actio furti* in the owner's name.

Q. If a person under the age of puberty took away the property of another, did he commit theft? A. It is the intention that makes the theft, such a person is only bound by the obligation springing from the delict, if he is near the age of puberty and consequently understands that he commits a crime, LIB. IV, TIT. I, 501—509. Compare with Sections 82, 83 *ante*, and note *in re* under the latter section.

Larceny or theft has been defined by English law to be "the felonious taking (*animo furandi*) the property of another without his consent, and against his will, with intent to convert it into the use of the taker." For definition of felonious taking, see note on Sections 390, P. C. The ingredients of larceny are (1) *felonious taking*; (2) *without consent and against will of owner*; (3) *taker's intent to convert property to his own use*. The P. C. definition of theft is given in Section 378. The ingredients are (1) *intention to take dishonestly*; (2) *movable property*; (3) *without consent of owner*. "Dishonest taking" is when there is intention to cause either wrongful law of property to owner, or wrongful gain of property to another person. Movable property only can be subject of theft, "Movable property" includes corporal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth. The thing stolen must be a subject of property. Larceny at common law cannot be committed of

things not the subject of property, nor of animals, *feræ naturæ*. "Taking without consent of owner" may be otherwise than by forcible seizure, as where A, with intent to steal, induces B, by an artful trick, to part temporarily with his goods, B having no intention to divest himself of the ownership of said property. Here A's intention was dishonest, and he took B's movable property out of B's possession without B's consent. "The taking should be not only wrongful and fraudulent, but should also be without any colour of right" (Parke). "If there be any fair claim of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal" (East, Pleas of the Crown). Too great caution cannot be exercised in cases in which there is room for doubting the criminal intent before any one is subject to the pain and ignominy of a prosecution. In regard to the *dishonest intent* of the prisoner at the time he takes the movable property, there must be no reasonable doubt.

Necessitas inducit privilegium quoad Jura privata." Where a man in extreme want of food or clothing steals either in order to relieve his present necessities, the law of England allows no such excuse to be considered, but the Crown has a power to soften the law, and to extend mercy in a case of peculiar hardship (Broom, 12). The above is with reference to necessity of self-preservation. With reference to necessity of obedience, if a larceny be committed by a *fême covert* in the presence of her husband, the law presumes that she acted under his coercion and excuses her from punishment. This presumption may be rebutted by evidence, and if proved that she acted voluntarily and not by constraint, although he was present, and concurred, she will be guilty and liable to punishment; if in the absence of her husband she commit a like offence, even by his order or procurement, her coverture will be no excuse. There is no mention in the Penal Code, similar to this provision of the English law, and there is no reason for believing that this doctrine of English law would be accepted as a valid plea in this country. But the relation which exists between parent and child, or master and servant, will not excuse or extenuate the commission of any crime, of whatever denomination; for the command to commit a crime is void in law, and can protect neither commander nor instrument.

Where a Court finds that parties came with a number of armed men and carried off a crop, the finding amounts to that of a forcible carrying off without the consent of the owner; even if they took no part in the actual taking, they must with reference to Section 114, P. C., be considered guilty of the substantive offence under Section 378 (8 W. R., 59).

A forcible seizure of the bullocks of A for something that A's husband in his lifetime may have owed, would be causing wrongful loss to A and a conviction of theft would stand (1 R. C. C. R. 60).

[Any Mag.]

[Cog. Not bailable.]
[Warrant.]

*379. Whoever commits theft (378) shall be punished

Punishment for theft. with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both (*or whipping in lieu*, VI, 2, *if previously convicted, whipping in lieu of, or addition to*, VI, 3). (*Triable summarily* under Section 222, C. C. P.)

A woman cannot be guilty of stealing her husband's goods (1 Hale, P. C., 514). As between man and wife, theft does not exist in law, at least as *furtum* in the strict signification of the term. (See note *post* from T. and J., M. R. L.) But if she and a stranger steal the goods, the stranger is liable (Reg. v. Tolfree. Roscoe, 913).

Under the Roman law neither husband nor wife could institute against each other the *actio furti*. Both husband and wife must strike out the element of theft, and choose an action proper and suitable to the circumstances of the case. To this important rule there were only two exceptions:—(a). Where the purloinment took place at the very moment of a contemplated separation; in this case the *Actio rerum amotarum* was given; (b). Where it occurred before marriage, and divorce subsequently takes place, in which case the *Condictio furtiva* would lie (T. and J., M. R. L., 125).

By Section 19, Act V, 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding judges.

The things stolen must be movable property as defined in this Code. But a person may be convicted of mischief in cutting down a tree fixed to the freehold, and then for subsequently stealing the tree so cut down (2 Bo. H. Ct. R., 416). It has been ruled that the taking of property by the prisoner in satisfaction of a debt due to him by the prosecutor is theft (1 R. C. C. Cr., 60). See also Full Bench Ruling *in re* Queen v. Madaree, when a chowkeydar took three cows out of prosecutor's eight cows, to pay her creditors for sums claimed by them.

Inability to prove a prescriptive right to fish within certain limits free from payment of rent is quite distinct from the want of right of any kind to fish therein, rendering a person so fishing liable to be brought up for the theft of fish taken by him (16 W. R., 78).

[Any Mag.]

[Cog. Not bailable.]
[Warrant.]

*380. Whoever commits theft (378) in any building,

Theft in dwelling-house, &c. tent, or vessel, which building, tent, or vessel is used as a human dwelling, or for the custody of property, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine (*or whipping in lieu*, VI, 2, *if previously convicted, whipping in lieu of, or addition to*, VI, 3). (*Triable summarily* under Section 222, C. C. P.)

A Magistrate is not bound to commit a person accused under this section, because he has been previously convicted under Chapter XVII, P. C. He can, if he thinks fit, pass sentence within his competence; because the Schedule attached to C. C. P. does not provide that persons punishable under Section 75, P. C., are to be tried by any other Court than that which would have had jurisdiction over the offence, if there had not been any previous conviction (2 R. J. P. J., 109).

The theft of a cloth spread out to dry on the top of a house, to which the prisoner got across by scaling a wall, is not theft in a dwelling-house, but simple theft; and the fact that the roof was used for domestic purposes makes no difference (1 Madras Jurist, 282).

Accused who had previously been convicted of simple theft (Section 379, I. P. C.), was a second time convicted of theft in a house under this section, and was sentenced to stripes in addition to other punishment. *Held* sentence of whipping legal, as theft in a building is only a more aggravated form of theft, and includes the latter (2 P. R., 89).

[*Cl. of S. or M. of
1st or 2nd Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*381. Whoever, being a clerk or servant, or being employed *in the capacity of* a clerk or servant, commits theft (378) in respect of any property in the possession (27) of his master or employer, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine (*or whipping in lieu*, VI, 2, *if previously convicted, whipping in lieu of, or addition to*, VI, 3). (*Triable summarily* under Section 222, C. C. P.)

Clerk in modern usage means a writer in an office, public or private, either for keeping accounts or entering minutes (W. L. L., 195).

Servant in husbandry is called a labourer; there are servants in particular trades also menial servants (W. W. L., 597). For a further definition legal and colloquial, see note to section 408, *post*.

A hired boatman does not come within the definition of a clerk or servant under Section 381, P. C. Theft by such a person on board a boat comes under Section 380, P. C. (8 W. R., 33. *Queen v. Bawool Manjee*).

In the capacity of.—A theft within the meaning of this section must be committed by the clerk or servant in his capacity as such. The confidential nature of the relationship between master and servant aggravating the offence when committed by a person in whom trust is reposed.

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*382. Whoever commits theft (378), having made preparation for causing death (46), or hurt (319), or restraint (339), or fear of death, or of hurt, or of restraint, to any person (11) in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine (*or whipping in lieu, VI, 2, if previously convicted, whipping in lieu of, or addition to, VI, 3*). (*Information compulsory, vide Section 89, C. C. P.*)

Theft after preparation made for causing death or hurt, in order to the committing of the theft.

Illustrations.

(a.) A commits theft on property in Z's possession; and while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z, in case Z should resist. A has committed the offence defined in this section.

(b.) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, and should attempt to apprehend A. A has committed the offence defined in this section.

OF EXTORTION.

Dishonest intention is common to this, as well as the crime of theft. The difference between *theft* and *extortion* being that in the former the offender's intention must be to take "without that person's consent;" in the latter, by *wrongfully obtaining* of a consent. It will be observed that the word *movable* is omitted in the definition of extortion, immovable property, therefore, may be the subject of the offence of extortion. The ingredients of extortion are: (1) putting a person in fear of injury to himself or another:

(2) that such act was intentional; (3) that delivery of property took place; (4) and that this was done dishonestly.

383. Whoever intentionally puts any person (11) in fear *of any injury* (44) to that person or to any other, and thereby dishonestly (24) induces the person so put in fear *to deliver* to any person any property (22) or valuable security (30), or anything signed or sealed which may be converted into a valuable security, commits "extortion."

Extortion.

Illustrations.

(a.) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b.) A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay certain moneys to A. Z signs and delivers the note. A has committed extortion.

(c.) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(d.) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper, and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

Distinction between this offence and theft is that extortion is committed by the wrongful obtaining of a consent.

Of any injury.—Extorting money by threats of bringing a criminal charge is putting a person in fear of personal injury within the meaning of this section, whether charge be true or false (3 R. C. C. R., 19).

To deliver.—Delivery of property is necessary to support a charge of extortion (1 R. C. C. R., 20).

[Cl. of S. or M. of
1st or 2nd Class.]

[Uncog. Bailable.]
[Warrant.]

*384. Whoever commits extortion (383) shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Punishment for extortion.

To amount to the extent of extortion, property must be obtained by intentionally putting a person in fear of injury, and thereby dishonestly

inducing him to part with his property (4 W. R. C. R., 5). *Held* that it was not necessary in a case of extortion that the threat should be used, and the property used by one and the same individual, nor that the receiver should be charged with abetment, although that might be done (2 Bo. R., 417). A chowkeydar obtaining money from another person, either by fraudulent inducement, or dishonestly, or by putting that person in fear of injury, is punishable under Sections 417 or 383, 384, I. P. C. (3 W. R. C. R., 32). The making use of real or supposed influence to obtain money from a person against his will, under threat in case of refusal of loss of appointment, is extortion within the meaning of this section (18 W. R., 17).

[*Ct. of S. or M. of*
1st or 2nd Class.]

[*Uncog. Bailable.*
[Warrant.]]

*385. Whoever, in order to the committing extortion (383), *puts* any person (11) in fear or *attempts to put any person in fear*, of any injury (44), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Puts, or attempts to put, any person in fear.—It is essential for a conviction under this section to prove that the putting or attempting to put any person in fear is with the intent to get delivery of property by extortion.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[Warrant.]]

*386. Whoever commits extortion (383), by putting any person (11) in fear of death (46) or of grievous hurt (320) to that person or to any other, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Extortion by putting a person in fear of death or grievous hurt.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[Warrant.]]

*387. Whoever, in order to the committing of extortion (383), *puts or attempts to put* any person (11) in fear of death (46) or of grievous hurt (320) to that person or to any other, shall be punished with imprisonment of

Putting person in fear of death or of grievous hurt, in order to commit extortion.

either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Or attempts to put.—The attempt here alluded to is an attempt to commit a far more aggravated extortion, and is consequently far more severely punished. Any property movable or immovable may be the subject of extortion in Section 383 *ante*.

The feigning of an attempt to commit suicide in order to extort money is an offence under this section (1 I. J., 423).

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*388. Whoever commits extortion (383) by putting any person (11) in fear of an accusation against that person or any other, of having committed or attempted (511) to commit any offence (40) punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be punish-

Extortion by threat
of accusation of an of-
fence punishable with
death or transporta-
tion, &c.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

able under Section 377 (unnatural offence), may be punished with transportation for life (*or whipping in lieu, VI, 2, if previously convicted, whipping in lieu of, or addition to, VI, 3*).

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*389. Whoever, in order to the committing of extortion (383), puts or attempts to put any person (11) in fear of an accusation against that person or any other, of having committed or attempted to commit an offence (40) punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten

Putting person in
fear of accusation of
offence, in order to
commit extortion.

years, shall be punished with imprisonment of either description (53) for a term which may extend to ten years ;

[*Ct. of S.*]

[*Uncog. Not bailable.*]
[*Warrant.*]

and shall also be liable to fine ; and if the offence be punishable under Section 377 (unnatural offence), may be punished with transportation for life (*or with whipping in lieu of, VI, 2, if previously convicted, whipping in lieu of, or addition to, VI, 3).*

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Where, by arrangement among several persons, the threat is used by some, and the property obtained by that threat is received by the others, all are equally guilty of extortion (2 B. H. Ct., 417).

Delivery of the property by the person put in fear is essential to the offence of extortion. Therefore, if no delivery takes place, but the person intimidated passively allows the offenders to take away the property, this would not be extortion, but robbery, if the threat came under the terms of Section 390 (1 R. C. C. Cr., 20).

OF ROBBERY AND DACOITY.

390. In all robbery there is either theft (378) or extortion (383).
Robbery.

Theft is "robbery," if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property (22) obtained by the theft (378), the offender, for that end, voluntarily (39) causes or attempts to cause to any person (11) death (46), or hurt (319), or wrongful restraint (339), or fear of instant death, or of instant hurt, or of instant wrongful restraint.

Extortion (383) is "robbery," if the offender, at the time of committing the extortion, is in the presence of the person (11) put in fear, and commits the extortion by putting that person in fear of instant death (46), of instant hurt (319), or of instant wrongful restraint (339), to that person or to some other person, and by so putting in fear, induces

the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations.

(a.) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b.) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c.) A meets Z and Z's child on the high road. A takes the child and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z by causing Z to be in fear of instant hurt to the child, who is there present. A has therefore committed robbery on Z.

(d.) A obtains property from Z by saying—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

Robbery is the unlawful and forcible taking from the person of another, of goods, to any value, by violence or putting him in fear.

- (1.) There must be an unlawful taking; otherwise it is no robbery.
- (2.) It is immaterial of what value the thing taken is.

(3.) The taking must be by force or by a previous putting in fear, which makes the violation of the person more atrocious than private stealing; for, according to the civil law maxim, "*qui vi rapuit fur improbius esse videtur*," this previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies (4 Step. Com., 208-213; W. L. L., 842).

The Law Commissioners observe:—"In one class of cases, theft and extortion are in practice confounded together so inextricably, that no Judge, however sagacious, could discriminate between them. This class of cases, therefore, has in all systems of jurisprudence with which we are acquainted, been treated as a perfectly distinct class; and we think that this arrangement, though somewhat anomalous, is strongly recommended by conscience. We have therefore made robbery a separate crime." "Robbery" has been legally defined in English law as a "felonious taking of property from the person of another (or in his presence, against his will), by violence or

putting him in fear." "Felonious taking" has been defined as "when the goods are taken against the will of the owner, either in his absence, or in a clandestine manner; or where possession is obtained by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends in any such case fraudulently to deprive the owner of his entire interest in the property against his will."

Comparing this with Section 390, and the definition therein contained, it will be seen that the latter definition is wider than that of the English law, including violence or fear of violence, *after* the robbery has been committed. In the case of *Queen v. Ruhman Khan*, the prosecutor followed up the accused, who had committed theft, and one of them, turning round, assaulted her with a stick. They were convicted of robbery, but the High Court were divided as to whether the hurt was caused, in the words of this Section 390, "for that end" (3 W. R. C. R., 14). The use of violence will not make theft robbery unless the violence used is for one of the ends in this definition in Section 390: *e.g.*, the Madras High Court, in their rulings for 1865, *held* that when a thief abandoned his booty and ran off, throwing stones at the owner, who attempted pursuit, his purpose being to stay such attempt at pursuit, it was not robbery.

A boat was stopped by several persons on the pretence that it was required by the Magistrate, and it was then plundered, the boatman giving no opposition. *Held* that the parties were guilty of robbery, theft having been committed while the boatmen were under fear of wrongful restraint (5 W. R. C. R., 19).

When in committing theft there is an intention and an attempt to cause hurt, the offence is robbery (5 W. R., 95).

By the infliction of grievous hurt, theft becomes robbery, and all parties concerned in the offence are liable to punishment (6 W. R., 85).

391. When five or more persons (11) conjointly commit or attempt to commit a robbery (390), or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding (107) such commission or attempt, amount to five or more, every person so committing, attempting, or aiding, is said to commit "dacoity."

Dacoity.

Dacoity.—The use of the mere word "dacoity" in a charge gives no information to a prisoner, dacoity being a foreign word, and now a term of art. In cases of this nature a prisoner should always be charged with having, in company with more than four persons, committed robbery, and with having thereby committed dacoity, an offence punishable, &c. (Pro., 23rd November, 1863).

The definition of dacoity in the Penal Code is so wide as to extend

to what would have been treated as cases of plunder under the old law (3 W. R., 60).

Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery.

Robbery.—Theft or attempt to commit theft by causing hurt.

A prisoner charged with dacoity or robbery need not be charged with causing hurt as a separate offence, as causing hurt is part of the crime of dacoity (1 R. J. P. J., 65).

In the case of a prisoner committed of two different dacoities, according to C. C. P., the Judge should not give a consolidated sentence, but separate sentence for each dacoity, the aggregate of the two not exceeding what he could award as a consolidated sentence (1 R. J. P. J., 62).

[Cl. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

*392. Whoever commits robbery (390) shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the

Punishment for robbery.

[Cl. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years (*or with whipping in addition, if previously convicted of the same offence, VI, 4*). (*Information compulsory, vide Section 89, C. C. P.*)

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government, for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an Officer of Government duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

[Cl. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

*393. Whoever attempts to commit robbery (390) shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine, (*or*

Attempt to commit robbery.

with whipping in addition, if previously convicted of the same offence, VI, 4). (Information compulsory, vide Section 89, C. C. P.)

[Cl. of S. or M. of
1st Class.]

[Cog. Not bailable.]
[Warrant.]

*394. If any person (11), in committing or in attempting (511) to commit robbery (390), voluntarily causes hurt (321), such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine (*or with whipping in addition to, if previously convicted of the same offence, VI, 4). (Information compulsory, vide Section 89, C. C. P.)*)

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

*395. Whoever commits dacoity (391) shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. (*Information compulsory, vide Section 89, C. C. P.)*)

Where a body of men attack and plunder a house, the mere fact of the proprietor's family having been able to make their escape a few minutes before the robbers forced an entrance, does not take that offence out of the purview of Section 395. It is sufficient for the application of this section that the robbers cause, or attempt to cause, the fear of instant hurt or of instant wrongful restraint (6 W. R., 35; Queen v. Kisoree Pater).

When persons are found within six hours of the commission of a dacoity, with portions of the plundered property in their possession, the presumption of law is that they are participators in the dacoity and not merely receivers (3 W. R., 10).

When a prisoner committed dacoity and concealed the property so acquired near the scene of dacoity, and *subsequently* removed such property to another place, and while so doing was apprehended, the Sessions Judge convicted and sentenced him to two separate terms of imprisonment. One Judge held his sentence to be legal; two Judges held it to be illegal—ruled accordingly, "*Illegal*" (2 R. J. P. J., 278).

When a prisoner is apprehended eight days after the commission of a dacoity with part of the plunder in his possession, there is as good ground for charging him with dacoity as with having received or retained

with guilty knowledge, and he ought to be charged in the alternative form (5 W. R., 66).

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

396. If any one of five or more persons (11), who are jointly committing dacoity (391), commits murder (300) in so committing dacoity, every one of those persons shall be punished with death (53) or transportation for life (53), or rigorous imprisonment for a term which may extend to ten years (53), and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

If a person concerned in a dacoity unintentionally commits murder, he is liable to punishment under this section. But he cannot be separately convicted of murder under Section 302, and of dacoity under Section 395 (W. R., 1864, 30).

[*Ct. of S.*]

[*Cog. Not bailable.*
[*Warrant.*]

*397. If at the time of committing robbery (390) or dacoity (391), the offender uses any deadly weapon, or causes grievous hurt (322) to any person (11), or attempts (511) to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. (*Information compulsory, vide* Section 89, C. C. P.)

In a case of dacoity aggravated as described in Section 397, P. C., both Sections 395 and 397 must be cited in the charge. If the Judge be convinced that prisoner is guilty under one charge, he should not sentence him under another, merely on account of a doubtful confession of guilt (5 R. J. P. J., 137, No. 855).

A conviction under Section 397 equally good, whether the number of thieves be five or under (2 W. R., 49).

Several references having been made regarding the operation of Sections 392, 394, and 397, the High Court, Madras, circulated the following opinion for the guidance of the Lower Courts. In cases of robbery the Legislature has provided three different degrees of punishment. Under Section 392 punishment may be extended to fourteen years imprisonment; under Section 394 punishment may be extended to transportation for life, and under Section 397 punishment cannot be less than seven years. Section 392 is the general section, and the other two sections specify the same offence under aggravated circumstances. Under Act VIII of 1866,

a Magistrate with full powers has jurisdiction under Section 392, but not under Section 394 or 397. The question for consideration is, whether the mere fact of evidence being sufficient to support a conviction under Section 394 or 397, will oust the Magistrate's jurisdiction under Section 392. With reference to Section 394, it is for the Magistrate in the exercise of his discretion to decide whether he will dispose of the case himself or commit accused to Sessions Court. Similarly with reference to Section 397 the offence is *prima facie*, triable under Section 392, but the effect of a sentence of imprisonment of not less than seven years being provided, takes the case out of the jurisdiction of the Magistrate. When two or more prisoners are jointly indicted, and the jurisdiction of the Magistrate is ousted in the case of one, the proper course is to commit both or all for trial before Court of Sessions (No. 481, Rulings High Court, Madras, dated 18th March, 1868; *Madras Jurist*, 243).

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

*398. If, at the time of attempting to commit robbery (390) or dacoity (391), the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years. (*Information compulsory, vide* Section 89, C. C. P.)

Attempt to commit robbery or dacoity when armed with deadly weapon.

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

*399. Whoever makes any preparation for committing dacoity (391), shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. (*Information compulsory, vide* Section, 89, C. C. P.)

Making preparation to commit dacoity.

Under the Indian Penal Code preparation to commit an offence is punishable only when the preparation was to commit dacoity. Preparation to commit any other offence, such as housebreaking or robbery, is not an offence (3 P. B., 43).

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

*400. Whoever, at any time after the passing of this Act, shall belong to a gang of persons (11) associated for the purpose of habitually committing dacoity (391), shall be punished with transportation for life, or with rigorous im-

Punishment for belonging to a gang of dacoits.

prisonment for a term which may extend to ten years, and shall also be liable to fine.

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, and the five preceding sections—viz., 395, 396, 397, 398, 399, or for an attempt to commit such offences, or for abetment within the meaning of the Penal Code of such offences. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

The attention of Government has been lately drawn to the increase of river dacoity in the Dacca district; Noakhali, the south-east of Tipperah, the south of Dacca, and the north of Furidpore, are full of professional dacoits who infest the great rivers and defy the existing police. Their mode of proceeding is this. Their spies give them notice of all boats on which money or valuables are likely to be found. The selected boat is marked down to its anchorage for the night, and a watch is kept over it till all the crew are asleep. Then, silently, the moorings are cut, and the boat towed out to the centre of the stream, where the dacoity is committed, any refractory *mallah* being thrown overboard. As these gangs only work on large, wide rivers, the advantages of this system are obvious. No alarm is caused on shore. There is no fear of interruption, or rescue; and before information can be given by the sufferers at the nearest thannah, the dacoits are miles down the river, out of the jurisdiction, leaving no trail behind them.

There is only one remedy likely to be effectual in rooting out this evil. These men must live in certain villages, and must be well known; place them, then, under special police surveillance, and make the villagers to which they belong pay the costs of such extra police, and when sufficient evidence can be procured against any member of this class of criminals, prosecute him under this section.

The surveillance above alluded to should be conducted on the system of the Thuggee Department, viz., by the careful cultivation of informers. Whatever method of external repression is adopted, as soon as ever it becomes routine the dacoits will adapt their procedure so as to evade it. But let them once feel that internal treachery is at work among them, and discouragement will spring up, until at last there will be a *sauve qui peut* into habits of honesty and order.

[Cl. of S.]

[Cog. Notailable.]
[Warrant.]

*401. Whoever, at any time after the passing of this

Punishment for belonging to a wandering gang of thieves.

Act, shall belong to any wandering or other gang of persons (11) associated for the purpose of habitually committing theft (378) or robbery (390), and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

It is not sufficient to support a conviction under this section that the accused should be proved to be simply a member of a robber tribe. It should also be shown that he actually consorted with persons who were themselves associated for the purpose of habitually committing theft or robbery (4 P. R., 67).

[*Cl. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*402. Whoever, at any time after the passing of this Act, shall be one of five or more persons (11) assembled for the purpose of committing dacoity (391), shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine. (*Information compulsory, vide Section 89, C. C. P.*)

See note under Section 400 *ante*. The proprietors of villages and the village chowkeydars should be worked under this section whenever any member of a body of dacoits of five or more persons is proved to reside in their villages, as it is compulsory on them to give the authorities notice of the fact of such persons being in such locality.

OF CRIMINAL MISAPPROPRIATION OF PROPERTY.

"This offence consists, not in wrongfully obtaining possession, but in the misappropriation, either permanently or for a time, of property which is already without wrong in the possession of the offender. The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention, which in theft is sufficiently manifested by a moving of the property, must in the other offence be carried into action by an actual misappropriation or conversion" (Macpherson, P. C., 359). Conversion means the wrongful appropriation of the goods of another (W. L. L., 236).

[*Any Mag.*]

[*Cog. Bailable.*]
[*Warrant.*]

*403. Whoever dishonestly (24) *misappropriates* or *con-*

Dishonest misappropriation of property. *verts to his own use* any movable property (22), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Illustrations.

(a.) A takes property belonging to Z out of Z's possession in good faith, believing at the time when he takes it, that the property belongs to himself. A is not guilty of theft: but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b.) A being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c.) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But if A sells the horse, and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for or restoring it to the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it : it is sufficient if at the time of appropriating it he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations.

(a.) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(b.) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c.) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d.) A sees Z drop his purse with money in it, A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e.) A finds a purse with money in it, not knowing to whom it belongs ; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f.) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately, without attempting to discover the owner. A is guilty of an offence under this section.

Misappropriation.—There is no definition of misappropriation given in P. C., but the literary meaning of appropriation given by Webster, at page 68 of his Dictionary, is “the act of setting apart or assigning to a particular use or person, in exclusion of all others ; application to a special use or purpose. Anything, especially money, thus set apart. The application of the payment of a sum of money by a debtor to his creditor to one of several debts which are due from the former to the latter.” His definition of the verb to appropriate is quoted from Blackstone, as meaning to alienate, as an *ecclesiastical benefice* and annex it to a spiritual corporation, sole or aggregate, being the patron of the living. He gives the definition of misappropriation as wrong appropriation, at page 843 of his Dictionary.

By Section 19, Act V, 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence or for abetment within

the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government duly authorized in that behalf by such Native Prince, or State, or by the Governor-General in Council, is one of the presiding Judges.

The misappropriation of each separate item of money with which a person is entrusted is a separate offence, and the facts connected with it should form the subject of a separate inquiry. The duty of a committing officer in such a case is to select certain distinct items, to frame his charges upon them, and to adduce evidence specially upon those items (15 W. R., 5).

A servant who retains in his hand money which he was authorized to collect, and which he did collect, from the debtor of his master, because money is due to him as wages, is guilty of criminal misappropriation (11 W. R., 51).

Converts to his own use.—To bring a prisoner within this section, there must be actual conversion of the thing appropriated to the prisoner's own use. Where, therefore, the accused found a thing and merely retained it in his possession, he was acquitted of criminal misappropriation under this section (10 W. R., 23).

[Ct. of S. or M. of
1st or 2nd Class.]

[Uncog. Bailable.]
[Warrant.]

*404. Whoever dishonestly (24) misappropriates or converts to his own use property (22), knowing that such property was in the possession (27) of a deceased person at the time of that person's decease, and has not since been in the possession of any person (11) legally entitled to such possession, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be

Dishonest misappropriation of property possessed by a deceased person at the time of his death.

[Ct. of S. or M. of
1st or 2nd Class.]

[Uncog. Bailable.]
[Warrant.]

liable to fine; and if the offender, at the time of such person's decease, was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

One offence which it may be thought we ought to have placed among

thefts (say the Law Commissioners) is the pillaging of property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person authorized to take charge of it. This crime in our classification, falls under the head, not of theft, but of misappropriation of property not in possession. The ancient Roman Jurists viewed it in the same light. The property taken under such circumstances, they argued, being in no person's possession, could not be taken out of any person's possession. The taking therefore was not *furtum*, but belonged to a separate head called the *crimen expilatae hereditatis* (Just. Dig. lib. XLVII, tit. 19). The French lawyers, however, long ago found out a legal fiction by means of which this offence was treated as theft in those parts of France where the Roman Law was in force (Domat. Sup. III). Mr. Livingston's definition of theft appears to exclude this species of offence nor could it be reached by any provision of his Code. By calling it misappropriation of property not in possession, an anomaly is avoided, and a line maintained which in the great majority of cases is reasonable and convenient.

Two notes were stolen from A, which B (not a *bonâ fide* holder for valuable consideration) tendered to C in payment for certain articles. C, not knowing B, refused to deal with him, whereupon B brought D, who was known to C, and the purchase was made by D, and paid for by him with the notes. *Held* that the part which D performed in the transaction amounted to a conversion of the notes to his own use (1 Bo. H. Ct. R., 263).

A person may commit the offence of dishonest misappropriation of property possessed by a deceased person at the time of his death, by dishonestly misappropriating the money entrusted to him, although he does not bring such money to his own use (2 W. R. C. R., 1).

OF CRIMINAL BREACH OF TRUST.

Criminal breach of trust, like criminal misappropriation, is the dishonestly misappropriating of property. The difference between *theft* and *criminal breach of trust* is, that in the *former* there is a wrongful taking or moving, whereas in the *latter* the property has been received on your behalf, and instead of being delivered into your possession, is dishonestly misappropriated to the offender's own use. Likewise between criminal misappropriation and criminal breach of trust, in the latter case the offender is lawfully entrusted with the property, and the offender dishonestly misappropriates the same, or wilfully suffers any other person to do so.

The English law of embezzlement corresponds to the provisions of this and the four following sections (*vide* 24, 25 Vic., c. 96). These sections in the Penal Code are more comprehensive than the English law on the subject. All the rules and principles applicable by English law to embezzlement equally apply to these sections.

405. Whoever, being *in any manner entrusted with property*, or with any dominion over property, ^{Criminal breach of trust.} dishonestly (24) misappropriates or converts to his own use that property, or *dishonestly uses* or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Illustrations.

(a.) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b.) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c.) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lac of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business, A has committed criminal breach of trust.

(d.) But if A in the last illustration, not dishonestly, but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e.) A, a revenue officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f.) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

In any manner entrusted with property.—Mr. Sconce in his treatise on *Master and Servants*, App. p. 22, says, "I am inclined to think that under the Penal Code when a clerk or servant makes away with property received by him from his master for a particular purpose, he may be charged either with theft or criminal breach of trust, or both, and this would be the safer

plan. But when the property is entrusted to him by a person, other than his master, for his master, and is misappropriated by the servant before it actually comes into his master's possession, the proper charge would be criminal breach of trust; but might not this also be theft? Does not the servant hold it on his master's account? this possession being the possession of the master?"

The words of the Penal Code "entrusted *in any manner* with property or with any dominion over property," render it almost unnecessary to consider whether the master, by entrusting his servant with property for a particular purpose, intended to part with the right to possession as owner as well as the custody of the property. They seem also to do away with the distinction which arises in cases under the English statutes between larceny and embezzlement, when property has been received *from* the master: or *for* the master from another person. The New York statute was similar in its effect to the Penal Code. It provided, that "if any clerk or servant shall embezzle or convert to his own use, or take, make away with or secrete with intent to embezzle or convert to his own use, without the assent of his master or employers, any money, goods, rights in action or other valuable security or effects whatever belonging to *any other person*." The words "*any other person*" in italics mean other than the prisoner, and would, I apprehend, include his master, or "any other person" who had placed property "in his possession," or "under his care" and on his master's account which shall have come *into his possession* or *under his care* in virtue of such employment or office, he shall upon conviction be punished in the manner prescribed by law for feloniously *stealing*, &c.

In a case under the American statute, *People v. Dalton*, 15, Wend., 581, 583 (I quote from Bishop's Criminal Law, Vol. II, § 302,) it was observed by Cowen, J.—"It is intended to provide for a fraudulent conversion of money or goods by a servant when they are delivered to him as such, either by his master or mistress *or in their behalf* by a stranger. This was but a breach of trust at common law, because the money or goods came to his hands by delivery. The statute intended to convert such a breach of trust into a crime." Mr. Bishop then refers to another case, and quotes Savage, C. J., in *People v. Hennessy*, 15, Wend., 147-151. "The very term embezzlement is peculiarly applicable to a fraudulent appropriation made by a servant of goods entrusted to him by his master."

The act itself cannot be said to have taken place until there is on the part of the criminal a refusal to account for, or a false account of, the goods which were originally lawfully in his possession. Then again the element of secrecy is one which is very important in determining on the crime, because an open and defiant claim set up *bonâ fide* to the money will prevent a conviction for the offence. *Absconding* is a very important point (see *R. v. William*, 7 Carrington and Payne) and will be held as evidence from which a jury may draw inferences.

The essence of the offence of criminal breach of trust, and the point which intensifies its guilt, is this—that the offender is put into a position of

possession and authority, and is treated with confidence in respect of the goods or other property, and then abuses his position. The mental offence is as much morally and *in foro conscientiae* a stealing—(where a deliberate intention exists, to appropriate another person's property for the bailee's own benefit) as is the physical removal of the property. The difficulties lie in deciding between the offences which are properly cognizable in a Civil Court, and those which are properly within the scope of the criminal law. Thus illustrations C and D to this section of the Penal Code will show what is meant as to the divergence which has to be considered, and the decision which has to be arrived at on the facts proved in every charge of criminal breach of trust; and nothing is more misleading than to imagine that cases of this kind have only one side and are met by a cut and dried code. On the contrary no class of cases call more emphatically for the consideration of motive—an important ingredient in every criminal proceeding, but very important indeed in such as we now discuss (4 M. J., 254).

Dishonestly uses.—To constitute criminal breach of trust, it is essential to establish the criminal character of the act by which the trust has been violated (3 N. A., N. W. P., Part I, 49).

Held that an acceptance of a bond covenanting to return a sum embezzled, precluded the acceptor of the bond from prosecuting the giver for criminal breach of trust (5 N. A., N. W. P., Part II, 86).

The correctness of this ruling appears doubtful from the very plain terms of Section 214, and the exception thereto attached; and moreover, if this were correct, we have to get over the following dilemma. A commits criminal breach of trust of 500 Rupees, property of B, and makes the same over to C, C knowing all the circumstances of the case. The property is found with C, and he is taken up by the Police under the provisions of Sections 410 and 411 *post*. A, the original offender, in the meantime executes a bond covenanting to return the sum embezzled. B accepts the bond. By this ruling he is precluded from prosecuting A, although C, the receiver of A's embezzlement, has no such *locus penitentiae*.

A refusal to give up land alleged to have been mortgaged, the mortgage being denied, cannot be treated as a dishonest misappropriation of the documents of title amounting to a criminal breach of trust under this section (2 Bo. R., 133).

[Ct. of S. or M. of
1st or 2nd Class.]

[Cog. Not bailable.]
[Warrant.]

*406. Whoever commits criminal breach of trust (405) shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

To constitute the offence of criminal breach of trust, it must be shown that the prisoner was entrusted with the property, or had dominion over it,

and that he dishonestly misappropriated it or converted it to his own use. There must be an intention proved on the part of the prisoner to cause wrongful gain or wrongful loss to constitute the offence of criminal breach of trust.

By Section 19, Act V, 1871, the Local Government may authorize the reception, detention, or imprisonment, in any place under such Government, for the periods specified in their respective sentences, of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence; provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

Where there is no provision in the Penal Code, and any other law (such as Breach of Trust Law Act of 1850) provides punishment for an offence, any person committing such an offence may be tried under that law (14 W. R., 80). Where a Sub-Inspector of Police was charged with having purchased a pony which had been impounded, it was held that the Magistrate should have proceeded under Section 19, Act I of 1871, taken with Section 169 *ante*, and that the accused could not be convicted under this section (16, W. R., 52).

Held by the Madras High Court in their rulings of 1864, that a wife cannot commit criminal breach of trust in respect of her husband's property.

If the defendant has appropriated or converted the property to his own use, under a claim of right, he will be entitled to an acquittal, unless the claim is so shadowy and unsubstantial as to be brought forward without any *bonâ fides*. Where an alleged mortgagee denied the mortgage, it was *held* that he could not be convicted of criminal breach of trust in respect of the title deeds (2 Bo. H. Ct. R., 133).

In cases where the law allows an offence to be compounded, held that such composition entitling a party to bring a civil action thereupon, amounts to a condonation of the criminal offence, and to an implied agreement not to prosecute; and that the party aggrieved must, in the event of stipulation made in conformity with the compact being infringed, bring a civil suit, and is not competent to prefer a criminal prosecution (5 N. A., N. W. P., Part II, 227, 1864).

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*407. Whoever, being entrusted with property as a carrier, wharfinger, or warehouse-keeper, commits criminal breach of trust (405) in respect of such property, shall be punished

Criminal breach of trust by carrier, &c.

with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Carrier in its general sense is a person who undertakes to transport the goods of other persons from one place to another (W. L. L., 162).

A *common carrier* is one who undertakes for hire to transport the goods of such as require to employ him from place to place, whether within or without the realm. Of this description are railway companies, proprietors of stage wagons and coaches, which carry goods for hire, lightermen, barge-owners, masters and owners of ships, and other persons owning similar instruments of public conveyance. The duty of a common carrier is to carry the goods of all persons offering (for there need not be an actual tender—Pickford *v.* Grand Junction Railway Company, 8 M. and W., 372)—to pay his hire. A town carman who does not convey goods from any one known terminus to another, nor at any fixed rate, not the goods of several persons at the same time, but plies in the streets and undertakes jobs as he can get them, is *not* a common carrier (Brind *v.* Dale; 2 Moo. and Rob., 39.) A carrier is a person of known responsibility, and generally able to render compensation for damages to goods which are under his charge, and which have been entrusted to him in the course of his acknowledged business as such carrier. This cannot be said of a coolie (S. M. and S., 86).

Wharfinger.—He that owns or keeps a wharf.

Wharf.—A broad plain place near some creek or haven to lay goods and wares on, brought to or from the water (W. L. L., 981).

Warehouse-keeper.—One who keeps a warehouse.

Warehouse.—A house to deposit or keep wares in.

Ware.—An article of merchandise, fabric, especially in the plural, goods, commodities, merchandise. "Retails his *wares* at wakes."—(Shakespeare; Webster, 1420).

By the custom of the realm, common carriers are (1) Bound to carry and receive the goods of the subject for a reasonable hire or reward; (2) To take due care of them in their passage; (3) To deliver them safely, and in the same condition as when received, or in default to make compensation to owner for loss or damage to goods while in their custody. Where such loss arises from storm, tempest, or the like acts of God the maxim "*actus Dei nemini facit injuriam*" applies, and loss must fall on owner, not on carrier. For damage occasioned by accidental fire, resulting neither from the act of God nor the king's enemies, a common carrier, being an insurer, is responsible. When, however, an injury is sustained by a passenger from an inevitable accident, as of upsetting of coach, the coach-owner is not liable, provided there was no negligence in the driver. *In re* Todul Singh, appellant, *v.* Captain Thomson, respondent, where the latter sued the former, a dâk carriage proprietor, to recover damages for the loss of his luggage, which in the

course of his journey was said to have been carried off by thieves, the High Court, N. W. P., held that there was no enactment prescribing the liability attaching to persons who let on hire dâk carriages for the convenience of passengers and their luggage in this country. The Carriers' Act of 1865 did not apply; they held that in the present instance the proprietor of the conveyance was to be regarded as bailee for hire, in respect of baggage so entrusted to him, and that the burden of the proof was on the defendant to show that such reasonable care was exercised, as to repel the presumption of negligence arising from the loss. The practice they propose to adopt had the sanction of the Roman and French law, and this instance was more in conformity with the principles by which the Courts in India should be guided, than the practice of the English Courts.

A breach of contract to convey a passenger from A. to B., if caused by *vis major*, appears to be excusable (B. L. M., 234).

Carriers by Section 3 of 24, 25, Vic., c. 96 (and as guilty of larceny), are now brought by English Law into the same position as are carriers in India by the 407th section. The gist of the matter lies in showing that there was such a delivery of the goods, as to vest their possession for the time being in the prisoner, and that these goods when the time mentioned had expired, were to be given to some other person or were to be restored to the bailor, *i. e.*, the person delivering them to the prisoner (who becomes the bailee by the Common Law of England, and becomes commonly liable in that capacity by the same statute as we have already alluded to). Formerly by the English Common Law—and we mention the point here because it is an illustration of one of the curious and subtle distinctions occasionally met with—it was held that if a person lawfully obtained the possession of goods as on a bailment for or on account of the owner, he could not during the time of duration of such bailment be guilty of larceny (or as the Indian Law terms it, criminal breach of trust), in appropriating the goods in any way whatsoever, as the wrongful change of possession had never taken place. Nor if such were not broken, was the bailee liable to Common Law. Thus a carrier, who had a sack of coals to deliver and sold the sack without untying it and pocketed the money, would not at Common Law be guilty of larceny. He would not have been by the operation of that law guilty of criminal breach of trust. The statute first referred to took away this impunity and rendered him liable exactly as the Penal Code renders him liable now; but we have thought it not uninteresting to allude, at this point, to the old Common Law rule, because a knowledge of these principles is essential to a *deep* knowledge of criminal law (4 M. J., 353).

[Ct. of S., or M. of
1st or 2nd Class.]

[Cog. Not bailable.]
[Warrant.]

*408. Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over pro-

Criminal breach of
trust by a clerk or serv-
vant.

perty, commits criminal breach of trust (405) in respect of that property, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Clerk (*Sax.* Cleric, *Lat.* Clericus) in modern usage means a writer in an office, public or private, either for keeping accounts or entering minutes (W. L. L., 195).

Servant.—Master and servant, a relation founded in convenience, whereby a person calls in the assistance of others when his own skill and labour are not sufficient to carry out his own business or purpose (W. L. L., 597).

“The word *servant*,” says Sconce, “in its ordinary colloquial sense, is usually understood to mean servants of the domestic or menial class, but in its legal acceptance it includes any one who is bound to perform services on the authority and for the benefit of another, his *master*, whether those services are rendered gratuitously or for a stipulated consideration. . . . It is perhaps difficult to say exactly what is included in the terms *domestic*, *menial*, or *household* servant. The words are synonymous, and imply residence and the performance of household work (*inter mania*), within the walls of the master's house or compound, the whole time and labour being at the master's disposal. In this country the bearer, *ayah*, *khidmutgar*, *coachman*, *syce*, *cook*, *punkah wallah*, *scullion*, and *mehiter*, and perhaps *mállie* (or gardener) would be within the terms household servant. . . . It has been decided, however, that a *durzee* (or tailor) working some hours a day in the house on monthly wages, is “not a household servant; even if he is a servant at all” (3 Bo. H. C., App. 21, S. M. & S. I).

A servant who receives money for a specific purpose and does not use it for that purpose, and on being called on to account for the money, falsely says he used it for that purpose, is guilty under this section (10 W. R., 28).

Where a Court inspector improperly delegated to a constable the custody, &c., of Government moneys, and the constable dishonestly converted the money to his own use, although he afterwards restored it, the case was held to fall under this Section 408, and not 409 (8 W. R., 1).

Embezzlement by servant is provided for by this Section 408 of the Penal Code, and is thereby punishable by imprisonment of either description for seven years. The essence of this offence of embezzlement in English Law is that it should be committed by a servant as declared by the English Court of Crown Cases Reserved in *R. v. Taree* (reported in the *Madras Jurist* of June last). This main proposition has often quashed cases through the evidence failing to prove the relative position of the prisoner. The very first advice given in Archibald's Criminal Pleadings “Prove that the defendant at the time he received the chattel, &c., was clerk or servant.” The *modé* by which such servant is remunerated is immaterial, for even where payment was a portion of the profits

on sale the case was held within the statute (*R. v. Hartby*). The next main point is that defendant received the property in the name of, or on account of, his master; and the third that he embezzled the money so received. This is usually proved by the fact of prisoner's receiving it and not accounting for it. But mere evidence of receipt of money entered by prisoner in his master's book as received by him, is not of itself *merely* evidence of embezzlement. Nor, on the contrary, will the mere fact of the correct entry take the case out of the statute, or turn a criminal default into a civil debt; though if instead of denying its appropriation defendant set up some right in himself however frivolous to the portion not paid, a conviction for embezzlement is improper (4 M. J., 353).

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Not bailable.
[Warrant.]*]

*409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant (21), or in the way of his business as a *banker, merchant, factor, broker, attorney, or agent*, commits criminal breach of trust (405) in respect of that property, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Banker, one who receives money in trust, to be drawn again as the owner has occasion for it (W. L. L., 113).

Merchant (*Fr. Marchand*), one who traffics to remote countries (W. L. L., 605).

Factor (*Fr. Facteur*), a substitute in mercantile affairs; an agent employed to sell goods or merchandize consigned or delivered to him by or for his principal for a compensation commonly called factorage or commission (W. L. L., 380).

Broker (*Fr. broceure. Lat. tritor*), a person who breaks into small pieces; an agent employed to make bargains and contracts between other persons in matters of trade, commerce, and navigation (W. L. L., 145).

Attorney (*Fr. tournée, Lat. attornatus, substituted*), one appointed by another to do something in his absence, and who has authority to act in the place and turn of him by whom he is delegated (W. L. L., 99).

Agent, a person appointed to transact the business of another (W. L. L., 48).

The extent of the agent's implied authority is as between his principal and third parties to be measured by the extent of his usual employment,

for he who accredits another by employing him must abide by the effects of that credit, whether the employer intended to authorize them or not (5 S. M. L. C., Section IV, 134).

The prosecutor accused his Karindah of having committed criminal breach of trust, and the Judge has ruled that inasmuch as the Karindah was an agent to collect rents, he was not liable to a criminal prosecution, and that proceedings could only be had against him in the Revenue Court. This view of the law is undoubtedly incorrect. The provisions of Act X of 1859 only transferred to the Revenue Courts those civil proceedings between landholders and their agents which would otherwise have been cognizable by the Civil Courts, but there is nothing in the provisions of Act X of 1859 above-mentioned which interferes with the jurisdiction of the Criminal Courts in matters which properly fall within their cognizance. If it be the duty of an agent of a landholder to keep the collections he makes for his master separate from his own moneys, expending thereout moneys on his master's behalf, and handing over the balance to his master, and if he in breach of this trust converts the money to his own use, he is amenable to a criminal prosecution, and there is nothing in Act X which deprives the Criminal Court of the cognizance of the offence; and where a landholder permits the agent to mix the collections with his own moneys, if the agent applies the moneys so collected to his own use fraudulently and dishonestly, and falsifies the accounts so as to conceal his fraud, there is evidence of a criminal misappropriation which would bring him within the scope of the provisions of the Penal Code, which provide for the punishment of criminal breach of trust. On the other hand, where a landowner allows the agent to mix the moneys with his own, if the agent converts such moneys to his own use not fraudulently nor dishonestly, and of this the keeping a correct account would be evidence, the agent is not liable to a criminal prosecution, and his masters can proceed against him only in the Revenue Court for the debt (7th February, 1871; 3 H. C., N. W. P. R., 30).

24 and 25 Vic., cap. 96, Sections 75, 76, 85, deals with frauds by agents, bankers, or factors. A clear opinion was expressed by two Judges in *Thompson v. Giles*, that a banker (notwithstanding that it was the usage of the county in which he lived amongst bankers) who negotiated bills entrusted to his care, knowing himself to be on the eve of bankruptcy, would run great hazard of incurring the penalties enacted in 52 Geo. III., cap. 63, a statute passed to prevent the embezzlement of securities for money deposited for safe custody or for any special purpose with bankers. That statute is now repealed; but similar provisions were substituted, first by the 7 and 8 Geo. IV., cap. 29, Sections 49, 50, and by 20 and 21 Vic., cap. 54, which were subsequently consolidated in 1861 in one statute, 24 and 25 Vic., cap. 96. The terms "*property*" and "*valuable security*," as defined in that enactment, are given under Sections 22 and 30 *ante*. See also G. L. B., 343-349, and as to the criminal liability of members and officers of Banking Companies, see *id.* 541-545.

Where an accused was charged before the Sessions Judge, under both Section 409 P. C., and under the special law, Section 29, Act V. of 1862, and was acquitted under the former section, it was held that the Sessions

Judge could not convict under the latter law as the magistrate alone has jurisdiction to convict under the law (9 W. R., 36).

Theft by constables of property from the house they were employed to guard, is punishable under Section 380, and not under this section (3 W. R., 29).

OF THE RECEIVING OF STOLEN PROPERTY.

*410. Property the possession (27) whereof has been transferred by theft (378), or by extortion (383), or by robbery (390), and property which has been criminally misappropriated (403), or in respect of which the offence of criminal breach of trust (405) has been committed, is designated as "stolen property." But if such property subsequently comes into the possession of a person (11) legally entitled to the possession thereof, it then ceases to be stolen property.

The essence of this offence consists in the receipt, with a full knowledge at the time of receipt that the property was fraudulently obtained. What the receiver's object may be in receiving the property, provided he knows that it was unlawfully obtained, is perfectly immaterial.

The subordinate officers of the Police often imagine that they cannot search a house suspected of containing property obtained by criminal misappropriation or by extortion; but this is clearly erroneous. Property so taken is by this definition stolen property, and the Police have the power to arrest without warrant any person in whose house is found property got by any of the means stated in Section 410. The Police may without any formal complaint apprehend any person found with stolen property (8 W. R., 28).

The owner of stolen property can recover the same from an innocent purchaser, or a pawnee who has taken it in pledge without knowing the same to be stolen. The pawnee is not entitled to retain it as against the rightful owner after conviction of thief (5 N. A., N. W. P., Part II, 225).

[*Ct. of S. or M. of*
1st or 2nd Class.]

[*Cog. Not bailable.*
[Warrant.]]

*411. Whoever dishonestly (24) receives or retains any stolen property (410), knowing or having reason to believe (26) the same to be stolen property, shall be punished with im-
Dishonestly receiving
stolen property.

prisonment of either description (53) for a term which may extend to three years, or with fine, or with both (*or with whipping in lieu of*, VI, 2, *if previously convicted, whipping in lieu of, or in addition to*, VI, 3). (*Triable summarily under Section 222, C. C. P.*)

Where the stealing takes place in British and the receiving in foreign territory, the British Courts have no jurisdiction in respect of the receiving unless the offenders are British subjects (2 P. R., 48).

In re R. v. Davis, the prisoner was indicted before a Commission of Assize, at the Glamorganshire Spring Assizes, 1870, for receiving goods with knowledge that they were stolen, a previous conviction for felony was proved against him, and it was then proved that the goods were stolen and that the prisoner had received them; but no evidence was tendered to prove a guilty knowledge on his part. A notice in the form indicated by 32 and 33 Vic., Cap. 99, Sec. 11, was shown to have been served on him seven days before the trial. The Commissioner directed the Jury to the effect that the intention of the legislature was to shift the *onus* of proving that the goods were not stolen upon the prisoner. The Court—Kelly, C. B., Martin, B., Channell, B., Blackburn, J., and Mellor, J.—held the above direction to be wrong. The design of the section was to create in the case of “habitual criminals” an exception to the rule that evidence of a previous conviction cannot be tendered until after the conviction for a later offence. The notice under Section 11 was merely to give notice to the prisoner that an exceptional course would be adopted, but was not intended to alter the law of evidence, nor to do away with the presumption of innocence which prevails in all criminal cases (6 M. J., 2, 75).

1. In this case the Joint Magistrate convicted four persons under Sections 411 and 414 of the Penal Code, and sentenced the second prisoner, who was an old offender, to four years’ rigorous imprisonment. The question for consideration is, whether the offences specified in Sections 411 and 414 of the Penal Code can be considered as two distinct offences, so as to allow of the procedure of Section 46 of the Criminal Procedure Code being adopted. (Section 314, Act X of 1872, contains the provisions of the old C. C. P., Section 46.)

2. This High Court are of opinion that if there was evidence of the receipt of the property (and the evidence of the fourth witness, and the prisoner’s own statement were sufficient to establish this) the conviction should have been under Section 411. Section 414 applies only where there has been no actual receipt of the stolen property. The act of concealing or assisting in concealing stolen property does not aggravate the offence of receiving it, and the acts of the prisoner throughout must, therefore, be held to be parts of one single continuous transaction. With this view the sentence was illegal and must be annulled. The Joint Magistrate must now be directed to pass a new sentence in accordance with law under Section 411 of the Penal Code (M. H. C., No. 3947 of 1868).

Where loss is occasioned to a person whose property has been stolen, it is not illegal for the trying Magistrate to award portion of the fine inflicted on the accused as amends to the owner of such property, although the stolen property is recovered and restored to the owner (5 Bo. H. Ct. R., Part II, 41).

Where, in the case in which a prisoner was convicted of theft, and also receiving stolen property, the sentence passed was really one for theft, the High Court, nevertheless, refused to allow the conviction for receiving stolen property to remain on the record against the accused, and reversed it (11 W. R. Cr. R., 12).

[Cog. Not bailable.]
[Warrant.]

[Cl. of S.]

*412. Whoever dishonestly (24) receives or retains any stolen property (410), the possession *whereof he knows or has reason to believe* (26) to have been transferred by the commission of dacoity (391), or dishonestly receives from a person (11) whom he knows or has reason to believe to belong, or to have belonged, to a gang of dacoits, property which he knows or has reason to believe to have been stolen (410), shall be punished with transportation for life (53) or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine (*or with whipping in lieu of*, VI, 2, *if previously convicted, whipping in lieu of, or in addition to*, VI, 3).

Whereof he knows or has reason to believe, &c.—In order to sustain a conviction under this section, of receiving property stolen at a dacoity, it is necessary to prove that the prisoner knew, or had reason to believe, that a dacoity had been committed, or that the persons from whom he acquired the property were dacoits (7 W. R. C. R., 109). Also in a case of plundered property, it must be proved that the prisoner received or retained plundered property, knowing it to be plundered property, before he can be convicted under this section (9 W. R., 16).

[Cog. Not bailable.]
[Warrant.]

[Cl. of S.]

*413. Whoever habitually receives or deals in property (22) which he knows or has reason to believe to be stolen property (410), shall be punished with transportation for life (53), or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be

Habitually dealing in
stolen property.

liable to fine (*or with whipping in addition, if previously convicted of the same offence, VI, 4*).

This section is levelled against the receiver of or dealer in stolen property. It is in many instances too little to say that the receiver is only equal to the thief in the degrees of crime. Half the habitual crime that exists anywhere, and nearly all the dishonesty existing among domestic servants (in England certainly), arises from there being an organized trade in getting pilferings.

To sustain a conviction under this section it must be shown that the property was stolen, and that the accused received it knowingly (2 P. R., 13).

When several items of property stolen from different places are found in the house of an accused person, it is better to regard them as evidence of the offence described in this Section 413, rather than as constituting separate offences under Section 411 (J. C., O. Book Cir. VI of 1870).

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*414. Whoever voluntarily (39) assists in concealing or disposing of, or making away with property (22) which he knows or has reason to believe (26) to be stolen property (410), shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both. (*Vide* note under Section 411, P. C.)

Assisting in concealment of stolen property.

The property at the time of the receiving must be *stolen* property. Goods were stolen by a servant and recovered by the owner, who afterwards delivered them to the servant who stole them, directing him to sell them to the prisoner, who had been previously suspected of receiving stolen goods. The servant did so, and returned the proceeds of the sale to the owner. It was held that the prisoner (accused as a receiver) could not be convicted under these circumstances. The goods which had been stolen had subsequently passed into the possession and were under the control of the real owner, and being so in his possession and under his control, they had been transferred by his authority to the prisoner (*Reg. v. Dolan*; 24 L. J. M. C., 59).

When prisoners are charged with the offence of assisting in concealing or disposing of property which they know, or have reason to believe, to have been stolen, in such a way as not to amount to receiving, the nature of the property as well as the circumstances under which it was being made away with, must be taken into consideration (2 Bo. H. Ct. R., 136).

OF CHEATING.

415. Whoever, by deceiving any person (11), fraudulently (25) or dishonestly (24) induces the person so deceived to deliver any property (22) to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do (33) or omit to do (33) anything which he would not do or omit if he were not so deceived, and which act (33) or omission (33) causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to "cheat."

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations.

(a.) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b.) A, by putting a counterfeit mark on an article, intentionally deceives Z into the belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c.) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d.) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e.) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f.) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g.) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money,

intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(A.) A intentionally deceives Z into a belief that A has performed A's part of the contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i.) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

In English law the ingredients of the offence of cheating are—(1) a false pretence; (2) person making pretence must know it to be false; (3) there must be an intent to defraud; (4) owner of property must have been deceived by the pretence, and have parted with his property in consequence of his belief in its truth. Unless the property is parted with under such belief, it cannot be said that the property was obtained from the owner by means of the pretence.

The subject of cheats at common law is very fully considered in the 2nd vol. of Russ. Cr. P. (Reg. v. Greaves) B. 4, Cap. 39, Sec. 1. The line is there very carefully drawn between such cheats and frauds as are of a public nature, and such as do not affect the public, and it is also strongly insisted on that the definition of a cheat indictable at common law must include the term that it is one *which affects or may affect the public*. Where a brewer was indicted for sending to a publican so many vessels of ale, marked as containing such a measure, and writing a letter assuring him that they did contain such a measure, when, in fact, they did not but so much less, the indictment was quashed as containing no criminal charge (Reg. v. Wildet). Lord Mansfield said it amounts only to an unfair dealing and an imposition upon this particular man; whereas fraud to be the object of a criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy (Reg. v. Wheatley). The indictment stated that the defendant came to M in the name of Y, to borrow £5, on which M lent her the £5; *ubi re verâ* she never had any authority from Y to borrow money—*held* this was not an indictable offence. Holt, C. J., put the following case:—A young man seemingly of age came to a tradesman to buy some commodities, who asked him if he was of age, and he told him he was, upon which he let him have the goods, and upon an action, he pleaded *infra ætatem*, and was found to be under age half a year; and afterwards the tradesman brought an action upon the case against him for a cheat, but after a verdict for the plaintiff, judgment was arrested. Powell, J., said, if a woman, pretending herself to be with child, does with others conspire to get money, and goes to several young men, and says to each she is with child by him, and that if he will not give her so much money, she will lay the bastard to him, and by these means get money of them: this is indictable. Holt, C. J., added, "I

agree ; it is so when she goes to several, but not to one particular person' (Reg. v. Glanville ; Roscoe, pp. 355 to 359).

24 and 25 Vic., Cap. 96, Sec. 88. *Obtaining a chattel by false pretences. Temporary possession.*

The prisoner had been tried before the Recorders of York, under the above statute, for obtaining a horse by means of false pretences. It was proved that he went to a livery stable-keeper at York, and alleged that he had been sent by K to obtain a horse for the use of the latter. The horse was given into his custody, he used it for some time, and then returned it to the owner. On application being made to K for payment of the horse's hire, it was discovered he had never authorized prisoner to get the horse for his use, and he refused to pay the demand. The Jury found the prisoner guilty, but added that the prisoner did not intend to deprive the prosecutor of the permanent possession of the horse. *In support of the conviction*, it was argued that it was enough to show that the false pretence set out in the indictment was the cause of the chattel coming into the prisoner's possession. This was an *obtaining*, and the prisoner benefited by the use of the horse ; the question whether his possession was permanent or temporary was therefore immaterial. The Court (Bovill, Willes, Byles, Hannen, and Cleasby) quashed the conviction. There was no evidence of an obtaining within the statute, and the case was disposed of by the finding of the Jury. The offence contemplated by the Legislature was the obtaining the possession of property, and it was not enough to show that the prisoner obtained only a loan of it. It is necessary in all such cases to prove a design to deprive the prosecutor of his property in and possession of the chattel (Reg. v. Killam, as reported in 5 *Madras Jurist*, No. 11, 445).

The difference, then, between English law and Indian law is, under the former the false pretence must be to an existing fact ; under the latter this is not necessary, as it may be as to a future state of things. Under the English law no civil action can be brought in respect of any claim which arises out of a felony, until the felony has been brought before a Court of Criminal Justice, and the offender punished ; but the High Court, Calcutta, have ruled that this principle of law does not obtain in India (2 R. C. C. R.). The High Court, Calcutta, *in re R. v. Acheet Lal* (17 W. R., 46), said, "It is, we think, a good general rule that one of two parties to an impending suit ought not to put the criminal law in motion as against the other in matters connected with the subject of that suit ; and if that is done, then, as a general rule, the hearing of the criminal case ought to be postponed till the suit is concluded. That is the usual practice, and it appears to us to be founded in good sense ; for it is clear that the procedure of a Criminal Court might otherwise be easily used for purposes of oppression." Under English law the prosecutor's belief or disbelief in the truth of the pretence is no answer to an indictment under 24 and 25 Vic., Cap. 96, Sec. 88 (5 M. J., 445).

The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The difference is that the ex-

tortioner obtains the consent by intimidation, and the cheat by deception (Law Commissioners' Report, Note N, 112).

A sends a boy to B to fetch money due to C, having no authority from C to do so. The boy goes innocently to B, and says, "I have come for C's money," gets it, and takes it to A, who keeps it. A is guilty of obtaining money from B on false pretences (*R. v. Butcher*, 28 L. J. M. C., 14). It would be best to charge A in this country under Sections 107 and 415, I. P. C., as abetting the offence of cheating, S. M. & S., 89; or A might perhaps be indicted as a principal and also as an abettor (see Section 108, Explanation 3, *ante*).

Deceit is the essence of a charge for cheating. Where, therefore, a workman stated that he had done more work than he really had, and requested payment for the work he stated he had done, and his master *knowing* that it was a false overcharge, and wishing to entrap him, paid him the amount demanded, it was held that the workman could not be indicted for obtaining money under false pretences, as it was not the falsehood which induced his master to part with the money (11 W. R., 51).

A foreman represented to his master that a certain sum was due to the workmen under him, and obtained a cheque for the amount stated to be due. The amount of the cheque exceeded by seven shillings the amount really due to the workmen. The foreman paid the workmen, but kept the surplus seven shillings to himself. He was held to have been guilty of obtaining the cheque under false pretences (10 W. R., 28).

But a person who should succeed in getting into A's service, alleging that he had been employed by B, and had a good character from him (this being the reverse of the facts) would hardly be indictable under this section, unless it could be shown that when he so obtained the service he intended harm to his future master. He might have intended on entering the service to do his work faithfully. In such a case it could hardly be contended from the mere fact that the man told a lie for the purpose of getting employment, that the act of employing him would be likely to cause harm to the employer.

If he presented a certificate of character, which was not a genuine certificate, the person so getting service, or seeking to get service, might be charged with forging or using as genuine a forged document (S. M. S., App. XXVI.).

Held by the Madras Court (H. Ct. Cir. 90 of 1863), that a mere breach of contract is not even *prima facie* evidence of intent to defraud.

To induce a high caste man to marry a low caste woman, by pretending that she was of higher caste, is criminal cheating (3 R. C. C. R., 32).

The mere taking money one day and dishonestly running away without paying it the next day, is not necessarily cheating; there must be an intention to deceive and defraud at the time of taking the money, and the subsequent conduct of the prisoner would only be evidence to show the previous dishonest intention (5 W. R., 5). The omission of a mere

courtesy cannot be taken to be equivalent to slandering or libelling a man, and is not an actionable wrong (3 Mad. R. 4).

Held that a person who induces a farmer to ferry him over the river by promise of payment, and then refuses to pay the toll, is guilty of the offence specified in this section, and punishable under Section 417 (2 N. A., N. W. P., Part IV, 431).

In case of cheating, where abetment of the offence is charged, it is necessary to prove that acts of the alleged abettor were intentionally done in concert with, and in furtherance of the agents in the fraud (3 N. A., N. W. P., Part I, 47).

An indictment for cheating under this section, and also 420, should state that the property obtained was the property of the person cheated, but an indictment defective in this respect, is defective for uncertainty only, and must be objected to before the Jury is sworn (1 Madras H. Ct. R., 31). From an examination of the following cases, *Sadoo Churn Pall*, petitioner, and *Queen v. Heeramun Halwye*, contained in the Criminal Ruling of the *Weekly Reporter*, Nos. 4 and 5, it appears that the offence of cheating turns upon the offender's *present*, and not *after*, intention not to do what he leads the other party to believe or expect he will do, but his *after-conduct* is evidence against him as proof of his previous intentions.

416. A person (11) is said to "cheat by personation,"
if he cheats by pretending to be some
other person, or by knowingly substituting
one person for another, or representing
that he or any other person is a person other than he or
such other person really is.

Cheating by person-
ation.

Explanation.—The offence (416) is committed whether the individual personated is a real or imaginary person.

Illustrations.

(a.) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b.) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

The offence of falsely personating another for the purpose of fraud, is a misdemeanour at common law. In most cases of this kind, it is usual where more than one are concerned in the offence to proceed as for a conspiracy. In one case, where the indictment charged that the prisoner personated one A B, clerk to H H, with intent to extort money from several persons, in order to procure the discharge of certain misdemeanours for which they stood committed, the Court refused to quash the indictment on motion, but put the defendant to demur (*Reg. v. Dupee*). It is

observed by Mr. East that it probably might have occurred to the Court that this was something more than a bare endeavour to commit a fraud by means of falsely personating another, for that it was an attempt to pollute public justice (2 East P. C., 1010 ; Roscoe, 429).

Money yielded to an accused, more in consequence of the credulity of the person practised upon than of any personal fear, renders the accused guilty of the offence of cheating ; but if in the obtaining of property a person is intentionally put in fear of personal injury, this constitutes the offence of extortion (5 R. J. P. J., 147).

G, by falsely pretending that he was a naval officer, induced B to enter into a contract to provide him with board and lodging at so much per week, in pursuance whereof he was supplied with food. *Held* that G could not be convicted of obtaining certain specified articles of food by false pretences, the supply of food being too remotely the result of the false pretence. (*In jure non remota causa sed proxima spectatur.*) In law the immediate, not the remote, cause of any event is regarded (B. L. M., 4th ed).

The magistrate should in no case listen to a private complaint of fraud in matters forming, or which ought to form, the subject of civil litigation, till the Civil Court has decided the matter before it in a sense which involves fraud on the part of the person accused, and has expressed his opinion that he ought to be prosecuted. It must on no account be allowed that it should be possible to put the same fact in issue in two different Courts, only confusion would result, and criminal prosecutions actuated by private interests would create constant scandal (J. C. O., Cir. 62 of 1862).

Wilfully deceiving a Tuhseeldar as to the nature of land applied for is cheating (M. H. C. R., 25 ; 10 M. J., 382).

Falsely stating in the name of another is not cheating by personation, but giving false evidence (Bo. H. Ct. R., Part I, 89).

Held that to induce a high caste man to marry a low caste woman by pretending that she was of high caste, is cheating by personation within the meaning of this section (3 R. C. C. Cir., 32). Where a person represented a girl to be the daughter of one woman, when she was, within his knowledge, the daughter of another woman,—*held* that he was guilty of cheating by personation under this Section 416, and that it was unnecessary to bring in Section 109, relating to abetment (7 W. R., 51).

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Warrant.]

*417. Whoever cheats (415) shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Punishment for
cheating.

Whenever in cases of cheating any property is delivered over to the

cheat, the party cheated has not the option of compounding the crime. (See provisions of Sections 215 and 216 *ante*.)

A passenger by railway travelling in a carriage of higher class than that for which he has paid fare, is not guilty of cheating under this section, but is indictable under the Railway Act of XVIII of 1854 (1 Bo. R., 140).

A person hiring certain property for use at a wedding, paying a portion of the hire, and giving a written promise to pay the balance of the hire, and to restore the property after the wedding, he being well aware that there was to be no wedding, and intending when he got the property to apply for its attachment in a civil suit in respect of an alleged claim, is guilty of cheating (3 N. W. P. H. C. R., 16).

The prisoners received a Government promissory note, promising to return certain jewels pledged to them, but not intending to do so, and they subsequently claimed to retain the note for another debt alleged to be due to them by the sender. *Held* that they were guilty of cheating (3 N. W. P. H. C. R., 17).

[*Ct. of S. or M. of*
1st or 2nd Class.]

[*Uncog. Bailable.*
[*Warrant.*]

418. Whoever cheats (415) with the knowledge that he is likely thereby to cause wrongful loss (23) to a person (11) whose interest in the transaction to which the cheating relates he was bound, either by law or by a legal contract, to protect, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect.

The offence herein described would appear to take in persons guilty of criminal breach of trust under Sections 407, 408, and 409.

A is employed by B as an attorney or agent to carry on a case for him, and take out execution of decree against C. A is bound to protect, within the extent of such agency, B's interests, and if he cheats B he is liable under this section. If he acted as agent or attorney for a bank, and instead of placing moneys so realized into the bank, as he was legally bound to do, and kept the moneys to repay himself for moneys due by the bank as pay to him for work done, he would bring himself within the provisions of Section 409 *ante*.

[*Ct. of S. or M. of*
1st or 2nd Class.]

[*Uncog. Bailable.*
[*Warrant.*]

*419. Whoever cheats by personation (416) shall be

Punishment for
cheating by personation.

punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

A vendor proceeded in company with three persons to Dacca, to register her deed of sale. Falling ill on the way, the three companions went to the Registrar's office; one of them there personated the vendor, and got registry of the deed: she was convicted of cheating by false personation, and the other two of abetting that offence. *Held* on revision, that as there was no intention apparent on the part of the accused to injure or defraud any one, the convictions should have been under Sections 93 and 94 of Act XX, 1866, and not under this section (2 B. L. R., 25).

[Cl. of S. or M. of
1st Class.]

[Uncog. Bailable.]
[Warrant.]

*420. Whoever cheats (415), and thereby dishonestly

Cheating and dishonestly inducing a delivery of property. (24) induces the person (11) deceived to deliver any property (22) to any person, or to make, alter, or destroy the whole or any part of a valuable security (30) or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

A induces B, a railway goods clerk, to make over to him, A, a parcel of shoes, giving B to believe that he A is C; he has made himself liable to the enhanced punishment awarded by this Section 420. It is further to be noted that *fine alone* is not a legal punishment under this section.

OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY.

11 Vic. c. 21 Secs. 50—70 contains provisions for punishing insolvents fraudulently making away with or concealing their property, with the intention of diminishing the fund to be divided amongst their creditors, or of giving undue preference to any creditor; also provides for the punishment for fraudulently destroying or falsifying books and papers. The above statute applies only to the High Court Jurisdiction. Act VIII of 1859, Sections 280—282, provides for the punishment of fraudulent concealment or transfer of property.

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Warrant.*]

*421. Whoever dishonestly (24) or fraudulently (25) removes, *conceals*, or delivers to any person (11), or transfers or causes to be transferred to any person, *without adequate consideration*, any property (22), intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Conceals.—The native is so in the habit of burying his valuables that the act of concealment which might in western countries lead one to presume dishonesty or fraud cannot be so relied on in India.

Without adequate consideration. Added to the fact that the property referred to has been transferred without adequate consideration must be shown that such transfer was dishonest or fraudulent.

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Warrant.*]

*422. Whoever dishonestly (24) or fraudulently (25) prevents any debt or demand due to himself or to any other person (11) from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Warrant.*]

*423. Whoever dishonestly (24) or fraudulently (25) signs, executes, or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person (11) or persons for whose use or benefit it is

really intended to operate, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Warrant.]*]

*424. Whoever dishonestly (24) or fraudulently (25) *conceals* or removes any property (22) of himself or any other person (11), or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Or fraudulently conceals.—To sustain a charge of fraudulent concealment under this section there must be evidence of the persons intended to be defrauded by such concealment (*R. v. Bain Dwaya*, 3 P. R., 41).

OF MISCHIEF.

425. Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss (23) or damage to the public (12) or to any person (11), causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief."

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

The offence of mischief under this Section was *held* not made out, without evidence that the accused intended or knew that he was likely to cause wrongful loss or damage to the complainant (*Kashi Nath Ghose v. Dinobundhoo Mytee*, 16 W. R., 72).

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(a.) A voluntarily burns a valuable security belonging to Z, intending to cause wrongful loss to Z. A has committed mischief.

(b.) A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c.) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(d.) A, knowing that his effects are about to be taken in execution, in order to satisfy a debt due from him to Z, destroys these effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and thus causing damage to Z. A has committed mischief.

(e.) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(f.) A causes a ship to be cast away, intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(g.) A, having joint property with Z, in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(h.) A causes cattle to enter upon a field belonging to Z, intending to cause, and knowing that he is likely to cause, damage to Z's crop. A has committed mischief.

Malicious mischief or damage is considered by the English law as a public crime; which is done not merely *animo furandi*, which is some though a weak excuse, but either out of a spirit of wanton cruelty or black and diabolical revenge. It bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property of individuals, and therefore any damage arising from this mischievous disposition is highly penal (4 Black. Com., 283).

Under 24 and 25 Vic., Cap. 97, Sec. 36, *in re Reg. v. Hardy*, held that the offence contemplated was not of a malicious character, and therefore, it was enough to show that the prisoner's act was unlawful, and one which he had no authority to do (6 M. J., 199).

This Section 425 supposes that the destruction was caused with the *intention* to cause wrongful loss or damage, and does not apply to cases of mere carelessness; and Section 17, Act III of 1857, supposes the mischief (cattle trespass) was done intentionally and not by negligence (10 W. R., 29; *Queen v. Araz Sircar*). Act III of 1857 was repealed by

Act I of 1871, an act to consolidate and amend the law relating to trespasses by cattle. Section 25 of the latter enactment is similar to Section 17 of Act III of 1857.

The right to a fishery was in dispute between the Zemindar of Bally and the Zemindar of Maharajpore. The former obtained a decree in the Civil Court declaring the fishery to be his, in proceedings to which the latter was not a party; and the servants of the Bally Zemindar thereupon removed a bamboo bar which the Maharajpore people had erected to prevent the passage of fish. For this they were convicted of mischief, and fined. *Held* by Norman, J., and E. Jackson, J., that the conviction could not stand, as the Maharajpore Zemindar had not shown that he was legally entitled to the fishery, and as it did not appear that the defendants were acting otherwise than from a *bonâ fide* belief that the Maharajpore Zemindar was encroaching on their master's rights (B. L. R., Part XIV, 17).

Where certain of the inhabitants of the village of Manori sallied out in boats and pulled up and removed a number of fishing-stakes lawfully fixed in the sea, within three miles from the shore, by the villagers of a neighbouring village. *Held* (1) that a Magistrate F. P. in the District had jurisdiction over the offenders; (2) that the Indian Penal Code was the substantive law applicable to the case; (3) that the offence amounted to mischief within the meaning of Sections 425 and 427 of the Indian Penal Code (3 Bo. H. C. R., 63).

Where a person levelled, filled up, and cultivated a watercourse over his lands, which conveyed water to the land of the prosecutor, it was held that this act was mischief under this section, if the defendant knew that the prosecutor was entitled to the water, and that by this act his right would be obstructed (2 R. C. C. Cr., 47). It is not illegal to convict prisoners first of mischief for cutting down Government trees without leave, and then of theft for subsequently stealing the trees so cut down (2 Bo. H. Ct. R., 416).

To constitute the offences of mischief and cattle trespass there must be intentional mischief. A malicious intent to cause damage is not required; it is enough that there is an act done with knowledge that damage is likely to be caused. Mere negligence, as in the case of stray cattle, does not seem to be penal, with the exception of neglect of pigs, which, by Section 18, Act III of 1857, is specially rendered liable to fine of ten rupees (Mr. Campbell's Cir., J. C. O., 87).

[*Uncog. Bailablz.*]
[*Summons.*]

[*Any Mag.*]
*426. Whoever commits mischief (425) shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine, or with both. (Punishment for committing mischief.)
(*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

Mere neglect on the part of an owner of cattle to keep them from straying into fields, is not causing cattle to enter a compound within the meaning of Section 425 *ante*. That section requires that before the owner is convicted of the offence, it must be proved that he actually caused the cattle to enter, knowing that by so doing he was likely to cause damage (Major Forbes and another *v.* Girish Chundra Bhuttencharjee, W. B. & R., App. 3).

[*M. of 1st or 2nd*
Class.]

[*Uncog. Bailable.*
[*Warrant.*]

*427. Whoever commits mischief (425), and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both. (*Triable summarily under Section 222, C. C. P.*)

Committing mischief, and thereby causing damage to the amount of fifty rupees.

In re R. v. Thomas indicted under 24 and 25 Vic., Cap. 97, Sec. 51, it was urged for the prisoner that the indictment was bad, because it did not contain the value of each individual article alleged to have been damaged. *Held* that the amount of damage done was the criterion of the offence, which might be evidenced by any number of acts of mischief, however small the damage done by each. The total amount of damage was the sole thing necessary to be proved, and the value of the articles themselves was therefore immaterial and need not be alleged (6 M. J., 438).

A conviction for committing mischief, under this Code and also under the Cattle Trespass Act, not illegal (Letter No. 9,090, 1863, 2 R. J. P. J., 25).

[*M. of 1st or 2nd*
Class.]

[*Cog. Bailable.*
[*Warrant.*]

*428. Whoever commits mischief (425) by killing, poisoning, maiming, or rendering useless any animal (47) or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Mischief by killing or maiming any animal of the value of ten rupees.

This section was made cognizable by the police by Section 46, Act XI of 1874, evidently to facilitate convictions in cattle-poisoning cases.

Regina v. Bullock (25 and 25 Vic., Cap. 9, Sec. 40.—*Wounding Cattle*.—The prisoner was indicted at the Gloucestershire Quarter Sessions (under the

Statute 24 and 25 Vic., Cap. 97, Sec. 40) for "maliciously and feloniously wounding a horse." It was proved that the prisoner had lacerated the horse's tongue, which protruded several inches from the mouth; but there was no evidence of the use of any instrument. The prisoner was found guilty, subject to a case for the opinion of this Court, and it was held (by Cockburn, C. J., Keating, Shee, and Lush, J. J. J., and Pigot, B.) that to support a conviction for "wounding" under the above section it is not necessary to show that any instrument was used; the injury may be inflicted with the hand (3 M. J., 160).

By English law, to kill, maim, or wound any cattle is felony, The word *Cattle* has been held to include horses as well as oxen, &c., pigs and asses (Rex. v. Paty; 4 Black. Com., 287).

[Cl. of S. or M. of
1st or 2nd Class.]

[Cog. Bailable.]
[Warrant.]

*429. Whoever commits mischief (425) by killing, poisoning, maiming, or rendering useless any elephant, camel, horse, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description (53) for a term which may extend to five years, or with fine, or with both.

Mischief by killing
or maiming cattle, &c.,
or any animal of the
value of fifty rupees.

By reference to the Schedule to the Code of Criminal Procedure, it appears that this Section 429, I. P. C., has also been made cognizable by the Police; in fact it would have been monstrous to empower the Police to arrest *suo motu* in cases of mischief by killing, poisoning, maiming, or rendering useless (not only cattle poisoning) any animal of a value of ten rupees or upwards, and to withhold the same power in commission of mischief to animals of higher value. The Amending Act XI of 1874, while it enacts the substitution of the words "may arrest without warrant" opposite Section 428, leaves the word "ditto" opposite Section 429 in the Schedule.

The action *damni injuria*, established by the *lex Aquilia*, a plebiscitum, made on the proposition of the tribune *Aquilius*, altering previous laws including the Twelve Tables, provided that if any one shall have wrongfully killed a four-footed beast, being one of those reckoned among *cattle*, belonging to another, he should be condemned to pay the owner the *greatest value* which the thing has possessed at any time within a year previously. *Four-footed beasts* meant those which are reckoned among *cattle*. These provisions did not apply to dogs or wild animals, but only to animals properly said to feed in herds, as horses, mules, asses, sheep, oxen, goats, and also swine. The words "greatest value," &c., above quoted mean not the greatest value at time of killing, not his actual value, but the greatest value he ever possessed within the year. It has been decided not by the virtue of the actual wording of the law, but by interpretation,

that not only is the value of the thing perishing to be estimated, as we have said, but also the loss which in any way we incur by its perishing—*e. g.*, if one of a pair of mules is killed account is to be taken, not only of the value of the thing killed, but also of the diminished value of what remains. The above refers to the first head of the *lex Aquilia*, but the third head provides for every kind of damage under which dogs and wild beasts are included, but in this case the greatest value the thing has possessed, not within the year next preceding, but the thirty days next preceding, is to be paid (San. N. L. J., LIB. IV, TIT. III, 512—518). And in times still more remote there were laws acknowledging that it was wrong to cruelly illtreat or hurt animals, for we find Æschylus in "The Suppliants" writing—

"For thus to honour those who gave us life,
This stands as one of *three great laws* on high,
Written as fixed, as firm,
The laws of right revered."

The *three great laws* were those ascribed to Triptolemus:—To honour parents, worship the gods, *to hurt* neither man *nor* beast.

In the Rulings of the Madras High Court published by Messrs. Higginbotham & Co., Madras, for 1866, was a ruling "that a calf does not come within the terms bull, cow, or ox;" from this it would appear that under this section, if any of the young of the animals herein mentioned are entered in the charge, they should be described by their sex, as "bull-calf," "cow-calf," "stallion-colt" or "mare-filly," &c. Upon an indictment on the Statute of 2 and 3 Ed. VI, which mentioned the words "horses, geldings, and mares," it was held that foals and fillies were included in those words, and that evidence of stealing a mare-filly supported an indictment for stealing a mare (Reg. v. Welland, Roscoe, Ev., 82; *vide* note on preceding section).

[Ct. of S. or M. of
1st or 2nd Class.]

[Cog. Bailable.]
[Warrant.]

*430. Whoever commits mischief (425) by doing any act (33) which causes, or which he knows will be likely to cause a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness, or for carrying on any manufacture, shall be punished with imprisonment of either description (53) for a term which may extend to five years, or with fine, or with both.

Mischief by injury to
works of irrigation, or
by wrongfully diverting
water.

A man levelled, partially filled up, and cultivated a watercourse over his lands, which conveyed water to the prosecutor's lands. *Held* he was guilty under this Section 430 (Ram Golam Singh, petitioner; 2 R. C. C. Cr., 47). By English law it is a felony maliciously to cut down any

river or sea-bank whereby lands might be overflowed and damaged (4 Black. Com., 283).

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.
[Warrant.]*]

*431. Whoever commits mischief (425) by doing any act (33) which renders, or which he knows to be likely to render, any public road, bridge, navigable river, or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description (53) for a term which may extend to five years, or with fine, or with both.

By English law, it has, by many special statutes enacted upon the occasions, been made felony to destroy sea-bank, river-bank, public navigations and bridges erected by Acts of Parliament (4 Black. Com., 283).

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Bailable.
[Warrant.]*]

*432. Whoever commits mischief (425) by doing any act (33) which causes, or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury (44) or damage, shall be punished with imprisonment of either description (53) for a term which may extend to five years, or with fine, or with both.

[*Ct. of S.*]

[*Cog. Bailable.
[Warrant.]*]

*433. Whoever commits mischief (425) by destroying or moving any lighthouse or other light used as a sea-mark, or any sea-mark, or buoy, or other thing placed as a guide for navigators, or by any act (33) which renders any such lighthouse, sea-mark, buoy, or other such thing as aforesaid, less useful as a guide for navigators, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, or with fine, or with both.

Section 281 *ante* deals with the offence of exhibiting a false light, mark, or buoy with intent to mislead.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

*434. Whoever commits mischief (425) by destroying or moving any landmark fixed by the authority of a public servant (21), or by any act which renders such landmark less useful as such, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Mischief by destroy-
ing or moving, &c., a
landmark fixed by pub-
lic authority.

Although there may be doubts as to what special enactments for the protection of village boundary-marks are in force in Oudh, this section supplies a punishment for the offence which will generally suffice (Mr. Campbell's Cir., J. C. O., 87).

[*Ct. of S.*]

[*Cog. Bailable.*]
[*Warrant.*]

*435. Whoever commits mischief (425) by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property *to the amount of one hundred rupees or upwards*, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Mischief by fire or
explosive substance
with intent to cause
damage to amount of
100 rupees.

To the amount of one hundred rupees or upwards.—It is a very common custom for the Police to refrain from taking cognizance of cases of mischief by fire on the plea that the property damaged did not amount to 100 rupees value. Often grain, stacked on a “kalyan” without any semblance of a roof over it, and no protection from the elements whatever, containing property valuing some 50 to 60 rupees, the poor asamis yearly all, is set fire to by some ill-conditioned vagabond of the village for some petty spite. Such an offence, though not coming under this section, is clearly an offence under the Penal Code, and would come under Section 285, *ante*, that offence is cognizable by the police, and therefore in all petty cases of injury by fire, however small the value of the property damaged, the police are, I think, bound to inquire into the matter on its coming to their knowledge.

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

*436. Whoever commits mischief (425) by fire or any

Mischief by fire or
explosive substance
with intent to destroy
a house, &c.

explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship, or as a human dwelling, or as a place for the custody of property (22), shall be punished with transportation for life (53), or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Arson, ab ardendo, is the malicious and wilful burning of the house or out-house of another man (see note on Section 285 *ante*, and 4 Black. Com., 249—253).

Arson is defined by Lord Coke to be the malicious and voluntary burning the house of another by night or by day. To constitute arson at common law it must be proved that there was an actual burning of the house, or some part of it, though it is not necessary that any part should be wholly consumed, or that the fire should have any continuance. To constitute a setting on fire it is not necessary that any flame should be visible (*Reg. v. Stallion*). It is felony if a man sets fire to his own house with intent to burn that of another, or under such circumstances that the house of another would in all probability be burnt (*Reg. v. Probert*). The house burned should be described as being in possession of the person who is in the actual occupation, even though the possession be wrongful. Thus, where a labourer was permitted to occupy a house as part of his wages, and after being discharged and told to quit in a month, remained in it after that period. *Held*, upon an indictment for setting fire to the house, that it was rightly described as being in the possession of the labourer (*Reg. v. Wallace*). It must be proved that the act of burning was both wilful and malicious, otherwise it is only trespass and not a felony (1 Hale P. C., 569). If A has a malicious intent to burn the house of B, and, without intending it, burns that of C, it is felony—(*Id.*) The intent to injure or defraud is an important ingredient in this offence, but, like the proof of malice and wilfulness, it will generally be assumed, for a party who does an act wilfully necessarily intends that which must be the consequence of his act (*Reg. v. Farrington. Reg. v. Philip*). It is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack under this statute, if he goes to the stack with the intention of setting fire to it and light a lucifer match for that purpose, but abandons the attempt because he finds that he is being watched (*Reg. v. Taylor. Roscoe*, 260 to 272).

By Section 19, Act V, 1871, the Local Government may authorize reception, detention, or imprisonment, in any place under such Government for the periods specified in their respective sentences of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for

abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

In drawing up a charge under this section, it is necessary to enter in the charge the fact that the mischief was caused intentionally or knowing that destruction of building would follow (3 W. R., Letter No. 688 of 1865). And further, the building should be described "as one ordinarily used as a place of worship, or as a human dwelling, or as a place for custody of property" (8 W. R., 30).

In re R. v. Manning for setting fire to an unfinished house, charged under 24 and 25 Vic., c. 97, s. 6, the Judges of the Court of Criminal Appeal held "that the words of the 6th Section were very general, being intended to comprise any erection not comprised within any of the classes enumerated in the earlier sections. Completion of the building for its intended purpose was unnecessary so long as the various parts of it were sufficiently connected to form one entire fabric (7 M. J., 160).

[*Ct. of S.*]

[*Cog. Not bailable.*]
[*Warrant.*]

437. Whoever commits mischief (425) to any decked vessel (48) or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.

The substantive law applicable to a British-born subject tried in the High Court of Judicature at Bombay, for destroying a British ship on the high seas, at a distance of more than three miles from the shores of British India, is the English Law, and not the Penal Code. Notwithstanding the provisions of Stat. 30 and 31 Vict., c. 124, s. 11, the same substantive law is applicable to prisoners who conspire together in Bombay to destroy such ship on the high seas, and such ship is so destroyed in consequence. The procedure applicable in such cases, is the ordinary criminal procedure of the High Court. There is not any Act of the Indian Legislature now in force which provides for the offence of destroying a ship, when committed at a greater distance than three miles from the coast, or for the abetment in British India of such an offence so committed. (See the arguments used *in re R. v. Elmstone, and Whitwell*. 7 Bo. H. C. R., 82-131.)

By English law any person maliciously damaging, otherwise than by fire, any ship with intent to destroy or render it useless, is guilty of felony (4 Black. Com., 284).

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

*438. Whoever commits or attempts (511) to commit mischief (425) as is described in the last preceding section, shall be punished with transportation for life (53), or with imprisonment of either description (53), for a term which may extend to ten years, and shall also be liable to fine.

Punishment for the mischief described in the last section, when committed by fire or any explosive substance.

By English law any person who sets fire to or destroys any ship, whether it be complete or in an unfinished state, or sets fire to, or casts away, or in anywise destroys any ship or vessel with intent to prejudice the owner, &c., is guilty of a felony, and punishable by imprisonment or transportation or penal servitude (4 Black. Com., 284).

In re R. v. Elmstone, Whitwell, &c., it was argued that Sections 437, 438, I. P. C., were applicable. Westropp, C. J., in his judgment held that the above sections were not applicable, he said, "As to those enactments (Secs. 437, 438), it should be observed that they do not mention the high seas, or necessarily apply to the destruction of vessels by fire or otherwise thereon. A sufficient field for the operation of those enactments presents itself in the rivers, creeks, harbours, estuaries, &c., of British India, and all round its coast to a distance of three miles. That the true scope of those sections did not, at all events, exceed this, is shown by the earlier sections in the Indian Penal Code itself. (*Vide* Sections 1 to 5, *ante*, 7 Bo., H. C. R., 114).

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

*439. Whoever intentionally runs any vessel (48) aground or ashore, intending to commit theft (378) of any property (22) contained therein, or to dishonestly (24) misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, &c.

[*Ct. of S.*][*Cog. Not bailable.*
[*Warrant.*]

*440. Whoever commits mischief (425), having made

Mischief committed after preparation made for causing death or hurt. preparation for causing to any person death (46), or hurt (319), or wrongful restraint (339), or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

OF CRIMINAL TRESPASS.

With reference to the definition contained in Section 441, it will be as well to bear in mind the following maxims with reference to public policy and the fundamental principles of legal science.

"Salus populi suprema lex."—That regard be had to the public welfare is the highest law. A private mischief shall be endured, rather than a public inconvenience, and therefore, if a highway be out of repair and impassable, a passenger may lawfully go over the adjoining land (B. L. M., 3., Edn. IV).

"Nullus commodum capere potest de injuria sua propria."—No man should take advantage of his own wrong to gain the favourable interpretation of the law; and therefore A shall not have an action of trespass against B, who lawfully enters to abate a nuisance caused by A's wrongful act (B. L. M., 275, 276).

The following remarks from an article in the *Madras Jurist* on the subject of Criminal Trespass, in the October number of 1869, helps to clear the meaning of this Section:—

"The thing to be considered is the part of the Section which makes it necessary that the entry should be made with a certain intent, namely, 'with the intent to commit an offence, or to intimidate, insult, or annoy, any person in possession of such property.' These words are of the last importance, and their effect is that a criminal trespass cannot be committed in the absence of a particular intention any more than can a theft without an intention to take 'dishonestly.' There is no difficulty in the words 'an offence,' now that Act IV of 1867 has been passed. But it would seem to be by no means easy to understand what the Legislature intended by the use of the words 'intimidate, insult, and annoy.' There can be no doubt, however, it is conceived, that the word *or*, which precedes them, must be taken to be a word of disjunction and distinction, and that therefore the kind of intimidation, insult, and annoyance contemplated would not *per se* constitute offences under Chapter XXII of the Indian Penal Code. They must be acts which, however objectionable and illegal in their nature, would not render a man obnoxious to punishment under the criminal law for the doing them. The term 'to annoy' presents greater difficulty. The root of the word is *nocere*, and annoyance is only another form of the word *nuisance*, which according to Russel 'signifies anything that worketh hurt, inconvenience, or damage.' And, therefore, it would be tolerably safe to

understand the term 'to annoy' to mean here the doing anything calculated to cause hurt, inconvenience, or damage of any kind to the possessor of the property entered into or upon. And in determining whether a particular act would be calculated to do this, it would be unnecessary to consider whether it would be calculated to do it in the case of a person 'of ordinary sense and temper,' within the meaning of Section 95 of the Penal Code, because that Section applies only to acts which, strictly speaking, are offences, whereas the annoyance here contemplated would not amount to an offence. Again, the word 'damage' has a most extensive meaning, and, according to the celebrated dictum of Lord Holt in *Ashby v. White*, is naturally imported by every injury to a right, though there be no pecuniary loss. So that if one has a right to keep the public out of his park, and objects to persons walking across it, and another walks across the park, injury will be done to the right, damage will flow from the injury, the damage will be an *annoyance*, and if it is a fact that the trespasser was well aware of the proprietor's right and wish to prevent him from walking across the park, an offence will have been committed against the law under notice, because the intent to annoy must be presumed from the circumstance that it was known by the trespasser that his act would cause annoyance. When we come to the application of the provision to ordinary cases arising in all parts of India, it is sufficient to determine with precision where a civil trespass became criminal. But an intention to cause annoyance must not be presumed by a Criminal Court where it remains doubtful whether in fact annoyance was caused by the act alleged to be a trespass.

"It must not, however, be supposed for moment that the Legislature have left the poor and weak remediless; for Section 15 of Act XIV of 1859 provides an all-sufficient summary remedy for any person who may be forcibly or illegally dispossessed of property.

"Finally, it must be borne in mind that trespass has never been an indictable offence at the Common Law, but indictments charging acts constituting a trespass and nothing more have invariably been quashed as unsustainable. And doubtless the Legislature of India were mindful of this when they created the new offence which they named criminal trespass. Our belief is that they never intended to authorize Magistrates to punish men for contending actively in defence of their supposed rights, however insufficient might be the basis on which their rights rested; and that where there is a *bonâ fide* or *reasonable* belief on the part of a man that he has a legal right to the present possession of any property, he cannot be held to have committed criminal trespass in entering into or upon that property with the intention of peaceably asserting and upholding his right. On the other hand, we believe that where a man commits trespass by entering into or upon property, well knowing that he has no right so to do, and that his trespass will cause annoyance to the proprietor, he commits an offence, and should be punished for it."

441. *Whoever enters into or upon property in the possession (27) of another, with intent to commit an offence (40) or to intimidate (503),*

Criminal trespass.

insult (504) or *annoy* any such person (11) in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass."

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined, when the thing made punishable by such law is punishable with imprisonment for a term of six months or upwards, with or without fine.

The name of "trespass" is given to every usurpation, however slight, of dominion over property. Trespass is not, as such, an offence, except when committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed, also by the end for which it is committed (Law Commissioners' Report, Note N., 114).

"Trespass in its largest and most extensive sense," says Blackstone, "signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. But in the limited sense, here used, it signifies no more than an entry on another's ground without lawful authority, and doing some damage, however inconsiderable, to his real property" (3 Black. Com., 217).

Whoever enters.—There must be actual entry upon property in possession of another with intent to commit an offence, or intimidate, insult, or annoy. The mere entry and damage to property does not seem to be penal when there was no further criminal intent (page 86, Mr. Campbell's Circulars, J. C. O.).

In possession of another.—The question of possession must be decided without reference to title, and a person who enters on property in possession of another with the intention defined in this Section 441 is guilty, having done so under a claim of title notwithstanding (7 W. R. C. R., 28).

Held by Jackson, J. (Markby, J., dissenting), that a Magistrate ought not to decline to go into a case of criminal trespass under this section, because the complainant did not make out his title to the land. The offence may be committed in respect of property in a person's possession, even though such possession may not have originated in right (11 W. R. Cr. R., 11).

With intent to commit, &c.—It is the *criminal intent* which is the principal ingredient in the offences of criminal trespass and house-trespass.

Commit an offence, or to intimidate, insult, or annoy.—Where the trespass

(if any) was not committed with intent to commit an offence, or intimidate, insult, or annoy the persons in possession, but in the *bonâ fide* assertion of a claim of title, this does not amount to criminal trespass, but for this the accused can be called to account in the Civil Court on a charge of trespass; the question of the accused's intent must be determined irrespectively of the question as to right of possession. If accused pleaded restoration to possession under Section 350, C. C. P., the question of possession would require determination (referred criminal case, High Court, 2 N. W. P. R., Part II, 82). An intention to intimidate, insult, or annoy any person in possession of a house applies not to constructive, but actual possession of the premises (17 W. R., 47).

In re the Vestry of St. Mary, Newington *v.* Jacobs, the Court observed that the owner who dedicates to public use as a highway a portion of his land, may exercise all other rights of ownership not inconsistent with such dedication; and that the appropriation made to, and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him at Common Law of any rights as owner of the land which are not inconsistent with the right of passage by the public, and there was nothing in the statutes modifying this law (17 W. R. 6, B. N. 18).

To bring a case under the definition of Criminal Trespass in this section, the entry must be made with the intent to commit an offence, or to intimidate, insult, or annoy. One member of a joint family commits no trespass by entering the house which forms the joint property, but he is guilty of that offence when he enters the room ordinarily occupied by another member of the family (15 W. R. 6).

The entry of one man on another's property, accompanied by the cutting down of trees on that property, is criminal trespass (1 W. R., 46).

442. Whoever commits criminal trespass (441), by entering into or remaining in any building or vessel (48) used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass."

House-trespass.

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

See notes on preceding section.

House-trespass may be aggravated by being committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass is designated as lurking house-trespass; the latter as house-breaking. House-trespass, in every form, may be aggravated by the time

at which it is committed. Trespass of this sort has always been considered as a more serious offence when committed by night than when committed by day. Thus there are four aggravated forms of that sort of criminal trespass, designated as house-trespass, lurking house-trespass, house-breaking, lurking house-trespass by night, and house-breaking by night. These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. . . . *e. g.*, A may commit house-breaking by night for the purpose of playing some idle tricks on the inmates. B may commit simple criminal trespass by merely entering another field for the purpose of murder. Here A commits trespass in the worst way. B commits trespass with the worst object (Law Commissioners' Report, Note N., 115).

Under English law an entry is complete, even where no part of the body has been introduced, if any instrument has been inserted for a criminal purpose—*e. g.*, a hook to draw out goods (Alison Crim. L., 289).

Where a forcible entry is made by A on B's premises, all persons in company with the former (provided he had no right of entry), are in the eye of the law equally guilty; and there exists no difference in law between those who use violence and those who do not. On this point, *vide* Bacon's Abridgment.

Although under this section a boat or vessel is for certain purposes classed with houses, it does not cease to be movable property under Section 378, *ante* (16 W. R., 63).

443. Whoever commits house-trespass (442), having taken precautions to conceal such house-trespass from some person (11) who has a right to exclude or eject the trespasser from the building, tent, or vessel (48) which is the subject of the trespass, is said to commit "lurking house-trespass."

Lurking house-trespass.

444. Whoever commits lurking house-trespass (443) after sunset and before sunrise, is said to commit "lurking house-trespass by night."

Lurking house-trespass by night.

445. A person is said to commit "house-breaking," who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing

House-breaking.

an offence (40), or having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :—

Firstly. If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly. If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly. If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly. If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly. If he effects his entrance or departure by using criminal force, or committing an assault, or by threatening any person with assault.

Sixthly. If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations.

(a.) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.

(b.) A commits house-trespass by creeping into a ship at a port-hole between-decks. This is house-breaking.

(c.) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(d.) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e.) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f.) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(g.) Z is standing in his door-way. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(h.) Z, the door-keeper of Y, is standing in Y's door-way. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

This section is to be construed as if the word "offence" denoted anything made punishable by P. C., or by any *special* (41) or *local* (42) law as therein defined.

Under English law, where the offender with criminal intent obtained admission by some artifice or trick, it was held to be a constructive breaking: *e. g.*, A man knocks at a door, and on its being opened he rushes in; or on pretence of taking lodgings enters the house, and then robs it, &c.; all these entries were held to amount to breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of a legal process (Arch., 406).

Where a prisoner convicted of house-breaking in order to commit "theft," and of "theft," both offences being portions of one continuous act, was sentenced on the first head or charge to one year's rigorous imprisonment, under Section 457, P. C., and on the second head of charge to receive twenty stripes, under Section 2, Act VI of 1864, the separate sentences (though not illegal) were disapproved of as contrary to the spirit and intention of the Whipping Act (5 Bo. H. Ct. R., Part II, 83).

NOTE.—In this case the accused Rámá was charged (1) with house-breaking, under Section 445 of the Indian Penal Code, in having broken into the house of the complainant, and (2) with theft in a dwelling-house, under Sections 378 and 380 of the same Code, in having stolen from the said complainant's house property of the value of Rs. 421-12-0; and was sentenced by J. F. Armstrong, Magistrate of the District of Kalladghi, on the first count to one year's rigorous imprisonment, under Section 453, and on the second count to eight month's rigorous imprisonment, under Section 380 of the Indian Penal Code.

On the examination of the Magistrates' return for the month of March, 1867, A. Bosanquet, Acting Sessions Judge, remarked: "The act com-

mitted by the prisoner formed a single offence, and he should have been convicted of theft under Section 454 of the Indian Penal Code."

He cited in support of his remarks, 2 Cal. W. Rep., Cr. R. 63, and 6 Cal. W. Rep., Cr. R. 39, and contended that in a case of house-breaking by night, accompanied with theft, the lesser crime was merged in the greater; that the accused should be punished only for the greater crime; that, therefore, he should be charged only with the greater crime, and that the act of theft committed by him was simply a matter of evidence to prove the greater crime.

In reply, the following letter was addressed by the Registrar of the High Court to the Sessions Judge (No. 930 of 1867, dated the 24th of June, 1867):—

"There would appear to have been conflicting decisions by the Calcutta High Court on the point to which your question refers, and there is a difference in the conclusions which have been arrived at in Calcutta and Bombay on this subject.

"It is a peculiarity of the Indian Penal Code, that it has in several places declared portions of one continuous criminal act to be distinct and separate offences. For instance, a single criminal transaction may combine two offences under the Indian Penal Code, namely, house-breaking with intent to commit theft, and theft. The Bombay High Court has held that a person guilty of a complex criminal act of this character may be charged and convicted of the distinct offences which he has committed, but that, under such circumstances, the punishment to be inflicted for these offences in the aggregate must not exceed the maximum punishment awardable for the offence which is the most grave in the estimation of the law, or the limit of imprisonment which the trying authority is competent to impose for a single offence. No objection would be taken to the conviction and punishment of the offender for one offence only, that is, for the most serious of the several offences committed, which is the practice directed to be observed by the Calcutta High Court; but the Bombay High Court has not declared it to be illegal to convict and punish for each of the several offences, and, consequently, your instructions to the Magistrate were not approved of" (2 Bo. H. C. R., 414; 5 Bo. H. C. R., Cr., ca. 3).

446. Whoever commits house-breaking (445) after sunset and before sunrise, is said to commit "house-breaking by night."

[Any Mag.]

[Cog. Bailable.]
[Summons.]

*447. Whoever commits criminal trespass (441) shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which

Punishment for criminal trespass.

may extend to five hundred rupees, or with both. (*Triable summarily* under Section 225, C. C. P.; also under Section 222, C. C. P.)

According to English law, where entry on property is *primâ facie* legal, by virtue of some authority, but that authority is subsequently abused, the offender becomes a trespasser *ab initio*; but it appears that where the original entry was by the consent of the owner, and not by virtue of an authority given by law, a subsequent abuse does not make the offender a trespasser *ab initio*, but it may become a separate offence. The authority to enter may be revoked either expressly or by implication. Where a man so abuses the authority of entry given him by the owner of the property as to make use of it for the purposes of committing an offence, the authority for his remaining on the property will not be assumed.

The reason of this difference between entry *primâ facie* legal and entry by permission of the owner, is given by Smith in his *Leading Cases*, 112, as follows:—"In the case of a general authority or licence of law, the law judges by the subsequent act *quo animo*, or to what intent he entered. But when the owner gives authority himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority."

The following propositions touching the construction and application of Section 441, *ante*, should be borne in mind, and will be found most useful:—

(1.) The possession must be shown to be in a person other than the accused.

(2.) It is immaterial whether the possession is actual or constructive.

(3.) If it is a case of constructive possession, and the accused is prepared to show that it was in himself, and appears to be contending *bonâ fide*, the Magistrate's jurisdiction is ousted.

(4.) Where an act was actually committed after entry made, that offence and not the trespass should be inquired into.

(5.) The intent to commit an offence, or to intimidate, insult, or annoy, is not necessarily to be inferred from the fact that the trespasser did commit an offence, or did intimidate, insult, or annoy.

(6.) A civil trespass is not rendered criminal by reason of the trespasser having committed an offence, or having intimidated, insulted, or annoyed some person in possession, where the trespasser had a *bonâ fide* belief that the possession was in himself when he made the entry, and entered and acted only for the purpose of asserting his supposed right in a legally proper manner (4 M. J., 433).

The definition of the offence for which punishment is here provided is given in Section 441, *ante* (*vide* that section and notes thereto). In construing that section, it must be borne in mind that it is limited to cases

where *the entry is in itself part of the unlawful act*, and is against the will of the owner, expressly or impliedly: *e.g.*, a man enters upon the property of another with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property, against the owner's will: here the intent undoubtedly connects the entry with the offence aimed at, and the transgressor is guilty of criminal trespass. But suppose A obtains a decree for possession of a certain field held wrongfully by B, and gets possession in the usual way; as soon, however, as the Sheriff's officer leaves, B enters the field and forcibly dispossesses A. *Query.* Is this criminal trespass? Under the definition given at Section 441, *ante*, it appears not, for B never intended to commit any offence, or intimidate, insult, or annoy A; his act was a clear seizure of A's land, devoid of any intent requisite by Section 441, *ante*, to make this act criminal trespass.

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

*448. Whoever commits house-trespass (442) shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

*449. Whoever commits house-trespass (442) in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Vide note under Section 265, *ante*, and Section 500, *post*, in *re* R. v. Almon, as to how far a master is liable for the criminal acts of his servants.

[Cl. of S.]

[Cog. Not bailable.]
[Warrant.]

*450. Whoever commits house-trespass (442) in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description (53) for a term not exceeding ten years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

[Any Mag.]

[Cog. Bailable.]
[Warrant.]

*451. Whoever commits house-trespass (442) in order to the committing of any offence punishable with imprisonment (all the penal sections of the Code, except 137, 154, 155, 156, 278, 283, 290), shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if

[Ct. of S. or M. of
1st or 2nd Class.]

[Cog. Not bailable.]
[Warrant.]

the offence intended to be committed is theft (378), the term of the imprisonment may be extended to seven years.

Committing any offence punishable with imprisonment.—A entered the house of B without the latter's permission, and committed adultery with B's wife. *Held*, that A could be separately convicted of, and punished for, both the adultery and house-trespass, as they were distinct offences; but that, under the circumstances, B's wife was by law incapable of committing abetment of the house-trespass (6 P. R., 5). It must be borne in mind that a charge under this section must charge the accused with committing house-trespass with intent to commit some specific offence punishable with imprisonment.

[Ct. of S. or M. of
1st or 2nd Class.]

[Cog. Not bailable.]
[Warrant.]

*452. Whoever commits house-trespass (442) having made preparation for causing hurt (219) to any person (11), or for assaulting (351) any person or for wrongfully restraining (339) any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Or of wrongful restraint.—Where A goes with a forged warrant of arrest into a house and takes away one of the inmates against his will under the authority of such warrant, he is guilty of house-trespass by putting such person in fear of wrongful restraint under this section (12 W. R., 33).

[M. of 1st or 2nd
Class.]

[Cog. Not bailable.]
[Warrant.]

*453. Whoever commits lurking house-trespass (443)

Punishment for lurking house-trespass or house-breaking. or house-breaking (445) shall be punished with imprisonment of either description (53) for a term which may extend to two years, and shall also be liable to fine (*or with whipping in lieu of VI, 2, if previously convicted whipping in lieu of, or in addition to, VI, 3 and 4*).

By Section 19, Act V, 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such governments for the periods specified in their respective sentences, of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence. Provided that such sentence has been pronounced after trial before a tribunal in which an officer duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding judges.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*454. Whoever commits lurking house-trespass (443) or house-breaking (445) in order to the committing of any offence punishable with imprisonment (all the penal sections of the Code, except 137, 154, 155, 156, 278, 283, 290), shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine; and if the offence intended

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Not bailable.
[Warrant.]*]

to be committed is theft (378), the term of the imprisonment may be extended to ten years (*or with whipping in lieu of, VI, 2; if previously convicted, whipping in lieu of or in addition to, VI, 3 and 4; if committed in order to commit an offence under Sections 378, 380, 381, 382, 388, 389, 411, 412, 193, 194, 195, 211, 377, 354, 375, 390, 391, 393, 394, 413, 463, 466, 467, 468, 469*).

It is not necessary to divide the charge into two counts when the facts prove a house-breaking by night with intent to commit theft, and theft in a building. The actual commission of the theft is conclusive evidence of the intent, and it is sufficient to convict for the major offence under

Section 457 (2 Madras Jurist, 77). Attempt to commit house-breaking by night with intent to steal, is not punishable with whipping (3 Bo. H. Ct. R., 37).

In charges under Sections 454 and 457 of the Penal Code, the lurking house-trespass or house-breaking being first established, the intent to commit an offence on the part of the prisoner may be presumed, and it is for him to rebut that presumption by showing that he entered the house for an honest purpose; and if the prisoner be of bad character, or have no ostensible means of livelihood, it may be presumed that the offence which he entered the house with the intention of committing was theft, unless these circumstances themselves are such as to rebut that presumption, or the prisoner prove the contrary (Circular No. 82 of 1855, J. C., O.).

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*455. Whoever commits lurking house-trespass (443) or house-breaking (445), having made preparation for causing hurt (319) to any person (11), or for assaulting (351) any person, or for wrongfully restraining (339) any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Lurking house-trespass or house-breaking after preparation made for causing hurt to any person.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*456. Whoever commits lurking house-trespass by night (444) or house-breaking by night (446), shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine (*or with whipping in lieu of, VI, 2; if previously convicted with whipping in lieu of or in addition to, VI, 3 and 4).* (*Information compulsory, vide Section 89, C. C. P.*)

Punishment for lurking house-trespass or house-breaking by night.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*457. Whoever commits lurking house-trespass by

Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment.

night (444) or house-breaking by night (446), in order to the committing of any offence punishable with imprisonment (all the penal sections of the Code, except 137, 154, 155, 156, 278, 283, 290), shall be punished with imprisonment of either description (53) for a term which may extend to five years, and shall also be liable to fine ;

[*Ct. of S. or M. of 1st or 2nd Class.*]

[*Cog. Not bailable.*
[*Warrant.*]

and if the offence intended to be committed is theft (378), the term of imprisonment may be extended to fourteen years (*or with whipping in lieu of*, VI, 2 ; *if previously convicted, with whipping in lieu of or in addition to*, VI, 3 and 4 ; *if house-trespass or house-breaking is committed in order to commit an offence* under Sections 193, 194, 195, 211, 354, 375, 377, 378, 380, 381, 382, 388, 389, 390, 391, 393, 394, 411, 412, 413, 463, 466, 467, 468, 469). (*Information compulsory, vide* Section 89, C. C. P.)

In drawing up a charge under this section, the offence intended with a view to which trespass was made should be entered in the charge (2 W. R., Letter No. 1119 of 1864).

A person who in the commission of lurking house-trespass by night, voluntarily attempts to cause grievous hurt to the owner of the house, who tries to capture him, is punishable under Section 460, P. C., and not under Sections 457 and 324, P. C. (2 W. R., 52).

A magistrate is not bound to commit a person accused under this section because he has been previously convicted under Chapter XVII, P. C. He can, if he thinks fit, pass sentence within his competence, because the schedule attached to C. C. P. does not provide that persons punishable under Section 75, P. C., are to be tried by any other Court than that which would have had jurisdiction over the offence, if there had not been any previous conviction (2 R. J. P. J., 109).

The conviction of a prisoner for two offences, when the one offence formed the integral portion of the other, held to be in effect punishing twice for the same offence, and therefore illegal (1 No. V, Reports of H. Ct., N. W. P., 31).

A entered into a house by night and stole a lotah. The magistrate sentenced him to 30 stripes for theft of lotah, and to two years' rigorous imprisonment for lurking house-trespass by night, under this section. The Judicial Commissioner pointed out to the magistrate that double conviction and sentence was, under the circumstances, illegal, for the offence of which the prisoner was guilty was made up of parts, and he ought not,

therefore, to have been punished with the punishment of more than one offence (*vide* Section 71, Penal Code ; Book Circular 83, 1864, J. C., O.).

[*Ct. of S. or M. of
1st Class.*]

[*Cog. Not bailable.
[Warrant.]*]

*458. Whoever commits lurking house-trespass by night (444) or house-breaking by night (446), having made preparation for causing hurt (319) to any person (11), or for assaulting (351) any person, or for wrongfully restraining (339) any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description (53) for a term which may extend to fourteen years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Lurking house-trespass or house-breaking by night after preparation made for causing hurt to any person.

[*Ct. of S.*]

[*Cog. Not bailable.
[Warrant.]*]

*459. Whoever whilst committing lurking house-trespass (443) or house-breaking (445), causes grievous hurt (320) to any person (11), or attempts (511) to cause death (46) or grievous hurt to any person, shall be punished with transportation for life (53), or imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

[*Ct. of S.*]

[*Cog. Not bailable.
[Warrant.]*]

*460. If, at the time of the committing of lurking house-trespass by night (444) or house-breaking by night (446), any person (11) guilty of such offence shall voluntarily (39) cause or attempt (511) to cause death (46) or grievous hurt (320) to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life (53), or with imprisonment of either description (53) for a term which may

All persons jointly concerned in house-breaking, &c., to be punishable for death or grievous hurt caused by one of their number.

extend to ten years, and shall also be liable to fine. (*Information compulsory, vide* Section 89, C. C. P.)

A person who, in the commission of lurking house-trespass by night, voluntarily attempts to cause grievous hurt to the owner of the house who tries to capture him, is punishable under this section, and not under Sections 457 and 324, *ante* (2 W. R., 52).

[*M. of 1st or 2nd Class.*]

[*Cog. Bailable.*
[*Warrant.*]

*461. Whoever dishonestly (24) or with intent to commit mischief (425), breaks open or unfastens any closed receptacle which contains or which he believes to contain property (22), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Dishonestly breaking open any closed receptacle containing or supposed to contain property.

[*Ch. of S. or M. of 1st or 2nd Class.*]

[*Cog. Bailable.*
[*Warrant.*]

*462. Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property (22), without having authority to open the same, dishonestly (24), or with intent to commit mischief (425), breaks open or unfastens that receptacle, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

Punishment for same offence when committed by person entrusted with custody.

This would apply to a bearer who dishonestly opened his master's cash-box or cheroot-box in his keeping, or with the intention of committing mischief; but it may be doubted whether opening an almirah or chest of drawers, which he might have authority to open for the purpose of keeping his master's clothes in order, would be a "breaking open" within the meaning of this section (S. M. and S., App. XXX).

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE
OR PROPERTY MARKS.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *transportation* or *penal servitude* or imprisonment for *more than five years* shall be whipped (Section 7, Act VI of 1864).

463. Whoever *makes any false document* (29) or part of a document *with intent* to cause damage or injury (44) to the public (12) or to any person (11), or *to support any claim or title*, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Forgery.

Interlineations in deeds are presumed to have been made previous to their execution, unless the contrary appears, or there are circumstances to cast suspicion on them—*Tronel v. Castle*; and the same rule seems to apply to erasures. But it is said that an erasure or interlineation in a deed upwards of thirty years old raises a presumption against the instrument, which must be removed either by the evidence of the subscribing witnesses or of some other party who can explain it. It may be stated, as a general rule, that, *prima facie*, all documents must be taken to have been made on the day they bear date—*Davies v. Lowndes*. Thus, a letter must be presumed to have been written and issued at the time it bears date—*Hunt v. Massey*; and the same holds in cases of bills of exchange and promissory notes—*Anderson v. Weston*; and the endorsements on them—*Smith v. Battens*; so a deed is presumed to have been executed and delivered on the day it is dated—*Stones v. Grubbam*. This rule is, however, subject to an exception, in the bankrupt laws, to prevent collusion between the creditor and the bankrupt (*Best, P. L. and F., 85 and 181*).

See Sections 45 and 47, Indian Evidence Act of 1872, regarding the opinions of experts, and Section 67 with reference to proof of signature

and handwriting of person alleged to have signed or written document produced.

"If several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals (*R. v. Bingley, R. & R., 2 East P. C.*); as if A counsel B to make the paper, C to engrave the plate, and D to fill up the names of a forged note, and they do so without knowing that the others are employed for that purpose, B, C, and D may be indicted for forgery, and A as the accessory (*R. v. Dade I. Moudys, C. C.*); for if several persons make distinct parts of a forged instrument, each is a principal, although he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of others."

The forgery of a copy of a document comes within the definition of forgery as contained in Section 463, P. C. (*W. R., 171*). To constitute the offence of forgery the simple making of a false document is sufficient. It is not necessary that the document should be published or made in the name of a really existing person. A writing which is not legal evidence of the matter expressed may yet be a document within the meaning of Section 29, *ante*, if the parties framing it believed it to be, and intended it to be, evidence of such matter (*10 W. R., 61*).

Makes any false document.—Making a fraudulent document without criminal intent is no offence under the Penal Code (3 *W. R., Letter No. 689 of 1865*). And the fraudulent preparation of a deed intending to cause injury to certain parties is not forgery, unless the document is a false document (5 *W. R., Letter No. 157 of 1866*).

Held, that to establish a charge of forgery it is unnecessary to prove that fraud was intended in the case in which the forged document was produced. It is sufficient to prove that the document was fraudulently uttered with intent to cause injury to any person (1 *N. A., N. W. P., Part II, 132*).

With intent to support any claim or title.—The signing of a vakalatnamah in the name of co-decree-holders without their authority to do so, and delivering it to the vakeel with instructions to file a petition, stating that the debt had been satisfied, and praying that the case may be struck off the file, is forgery within the meaning of this section (6 *W. R., 78*).

464. A person is said to make a false document—

Firstly. Who dishonestly (24) or fraudulently (25) makes, signs, seals, or executes a document (29), or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was

Making a false document.

made, signed, sealed, or executed by, or by the authority of, a person (11) by whom or by whose authority he knows that it was not made, signed, sealed, executed, or at a time at which he knows that it was not made, signed, sealed, or executed ; or,

It must be proved that the accused practised deception, so as to prevent a person from knowing the nature of the document, before the accused can be found guilty, under this section, of making a false document (9 W. R., 20).

See note under Explanation 1.

Where a prisoner who appealed to the Commissioner from an order of an Assessor under Act XXI of 1867, filed stamp paper for the Assessors' decision after the period of appeal had elapsed, but on appeal averred that he filed the stamp paper before the time for appealing had elapsed, and fraudulently obtained a certificate to that effect, which was antedated, it was held that he was guilty of having abetted the commission of forgery of a document within Section 463 and Clause 1, Section 464, I. P. C. (10 W. R., 23).

Secondly. Who, without lawful authority, dishonestly (24) or fraudulently (25), by cancellation or otherwise, alters a document (29) in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person (11) be living or dead at the time of such alteration ; or,

Thirdly. Who dishonestly (24) or fraudulently (25) causes any person (11) to sign, seal, execute, or alter a document (29), knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him he does not, know the contents of the documents or the nature of the alteration.

It is not necessary that a person should be pronounced insane under Act XXXV of 1858 before another can be sued under this clause (4 N. A., N. W. P., 11, Part I, 1864).

Illustrations.

(a.) A has a letter of credit upon B for rupees 10,000 written by Z. A, in order to defraud B, adds a cypher to the 10,000, and makes the sum 100,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(b.) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling

the estate to B, and thereby of obtaining from B the purchase-money. A has committed forgery.

(c.) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(d.) A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable, and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

(e.) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker, and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(f.) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B, and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g.) A endorses a Government Promissory Note, and makes it payable to Z or his order, by writing on the bill the words, "Pay to Z, or his order," and signing the endorsement. B dishonestly erases the words, "Pay to Z, or his order," and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h.) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i.) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he had prepared the will according to his instruction, induces Z to sign the will. A has committed forgery.

(j.) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(k.) A, without B's authority, writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an expressed or implied contract for service.

Explanation 1.—A man's signature of his own name may amount to forgery (463).

Illustrations.

(a.) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b.) A writes the word "accepted" on a piece of paper and signs it with Z's name; in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c.) A picks up a bill of exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable: here A has committed forgery.

(d.) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate to Z at a nominal rent, and for a long period, and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e.) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors, and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

The prisoner made certain entries in his ledger, which consisted of rough loose sheets, showing that certain sums of money had been repaid to the prosecutor, which in fact had not been repaid. *Held*, that the prisoner was guilty of forgery under Section 464, I. P. C. (1 I. J., 46).

Explanation 2.—The making of a false document (464) in the name of a fictitious person (11), intending it to be believed that the document (29) was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery (463).

Illustration.

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

[Ct. of S.]

[Uncog. Bailable.]
[Warrant.]

*465. Whoever commits forgery (463) shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both, (or with whipping in addition if previously convicted of the same offence, VI, 4).

The act of forgery consists in the making of a false document or writing. It will make no difference whether an entirely new document be constructed, or whether an old one be altered, so as to have a different effect. If a person, having the blank acceptance of another, be authorized to write on it a bill of exchange for a limited amount, and he writes on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, *held* it is forgery (Reg. v. Hart). It is essential to the crime of forgery, that the document should contain a false statement. This may be done by a person barely signing his own name to a document (Meed v. Young, T. R., 4-28). It has been settled that the signing of a fictitious name and of a non-existing person, is forgery (East, 2 P. C., 957; Reg. v. Lewis); and the same rule applies to a signature in the name of a fictitious firm (Reg. v. Rogers). The prisoner was indicted for forging a bank-note; the instrument, though resembling a real "bank-note," was not upon paper bearing the water-mark of the bank. The number also was not filled up, and the word "pounds" was omitted after the word "fifty," but in the margin were the figures £50. Contended on account of defects there was no forgery of bank-note—*held*, the prisoner was rightly convicted, for, *first*, in forgery there need not be an exact resemblance; it is sufficient that the instrument is *prima facie* fitted to pass for a true one; *secondly*, the omission of "pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner, but it was a matter to be left to the Jury, whether the note purported to be for £50 or any other sum: all agreed that the £50 in the margin removed all doubt (Reg. v. Elliott). Where the prisoner is charged with uttering or putting off a forged instrument, knowing it to be forged, evidence of that guilty knowledge must be given on the part of the prosecution; for that purpose the uttering or having possession of similar forgeries will be admissible. It is not necessary that the other forged notes should be of the same description and denomination as the note in question (Reg. v. Harris). The possession also of other forged notes by the prisoner is evidence of his guilty knowledge (Reg. v. Hough). In order to render such evidence admissible, it must be first proved that the other notes were forged, and they ought to be produced (Reg. v. Millard). Presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received (Phil. Ev., 473). Proof of the prisoner's general demeanour on a former occasion will be received for the same purpose. *Held*, from the conduct of the prisoner on one occasion, the Jury might infer his knowledge on another, such evidence ought to be received (Reg. v. Tattersall). In one case prosecutor offered to prove the uttering of another forged note five weeks *after* the uttering, which was the subject of the indictment.

Held the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the *same manufacture* (Reg. v. Taverner; Roscoe, 89, 90, 488, 489, 494, and 516).

The genuineness of handwriting, like other matters of fact, is capable of being proved or disproved by any species of legitimate evidence, direct or presumptive. The rule with respect to proof *ex visu scriptiois* is clear and settled; namely, that any person who has seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of that party, is a competent witness to say whether he believes the handwriting of the disputed document to be genuine or not. The having seen the party write but once, and even then but his signature, or even only his surname, is sufficient to render the evidence admissible; the weakness of it is matter of comment for the Jury. And the mark of a person who cannot write may be proved in the same way. The practice with reference to the presumption *ex scriptis olim visis*, is thus clearly stated by Patterson, J., in the case of Mudd v. Suckermore: "The knowledge of handwriting may also be acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which in the ordinary course of the transactions of life induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being, of course, added *aliundi* if the person be not personally acquainted with him." The number of papers, however, which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the admissibility of the evidence. Nor is it absolutely necessary for this purpose, that any act should be done or business transacted *by the witness*, in consequence of the correspondence. It is a question whether a witness who, either *ex visu scriptiois* or *ex scriptis olim visis*, has acquired a general knowledge of the handwriting of a party, which from length of time has partly faded from his memory, may be allowed during examination to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. The rule with reference to prove the handwriting of the party to a document by a comparison or collation instituted between it and others, proved or assumed to be in his handwriting, is, that evidence of handwriting based on such comparison or collation is not receivable. There are several exceptions to this rule, the first of which is, that it is competent for the Court and Jury to compare the handwriting of a disputed document with any other which is in evidence in the cause and admitted or proved to be in the handwriting of the supposed writer (Griffith v. Williams). The reason of this exception is, that the documents being already before the Jury, to prevent their mentally instituting such a comparison would be impossible. Another striking exception has been established in

the case of ancient documents. The law acting on its maxim, "*nemo cogitur ad impossibilia*," allows other ancient documents proved to have been regularly preserved and treated as authority to be compared with the disputed one. It is not easy to determine the precise degree of antiquity sufficient to let in evidence of this nature (Best P. L. and F., 217 to 234).

By Section 19, Act V of 1871, the Local Government may authorize the reception, detention, or imprisonment in any place under such Government, for the periods specified in their respective sentences, of persons sentenced within the territories of any Native Prince or State in alliance with Her Majesty, to imprisonment or transportation for the offence described in this section, or for an attempt to commit such offence, or for abetment within the meaning of the Penal Code of such offence; provided that such sentence has been pronounced after trial before a tribunal in which an officer of Government, duly authorized in that behalf by such Native Prince or State, or by the Governor-General in Council, is one of the presiding Judges.

The restriction contained in C. C. P., relative to sanction for prosecution, does not preclude a magistrate from taking cognizance of a criminal prosecution which may be instituted irrespective of any proceeding in any Civil or Criminal Court (10 W. R. C. R., 5).

The fact that a person was acquitted of a charge of forging pottah A, is no bar to his being tried for forging pottah B, although the two pottahs were, save as regards the land to which they related, identical, and notwithstanding that both were in evidence on the trial for forging pottah A (2 Madras Jurist, 134).

The punishment for using as genuine a document which is known to be forged is not provided for by this Section 465. Held that the punishment which may be awarded under Section 471, Penal Code, is not the punishment laid down for simple forgery; but that the offender shall be punished as if he had forged such a document as the one used (2 N. A., N. W. P., 209, Part III).

The Indian Evidence Act of 1872, Section 45, runs as follows:—When the Court has to form an opinion upon a point . . . as to identity of handwriting, the opinion upon that point of persons specially skilled in such science or art are relevant facts. Such persons are called experts. (*Vide* illustration (c), Section 45, Evidence Act.)

[*Uncog. Not bailable.*
[Warrant.]

[*Ch. of S.*]

*466. Whoever forges (463) a document (29), purporting to be a record or proceeding of or in a Court of Justice (20), or a Register of Birth, Baptism, Marriage, or Burial, or a Register kept by a public servant (21) as such, or a certificate or document purporting to be made

Forgery of a record
of a Court of Justice,
or of a Public Register
of Births, &c.

by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine (*or with whipping in addition if previously convicted of the same offence*, VI, 4).

It is a felony under Section 43, 6 and 7 Wm. IV, C. 86, to cause the Registrar to make an entirely false entry of a birth, marriage, or death (Reg. v. Mason). Therefore, where a woman went to a Registrar of births, and asked him to register the birth of a child, she stated to him the particulars necessary for the entry, he made the entry accordingly; she signed it as the person giving the information—*held* that this amounted to the felony of causing a false entry to be made within Section 43, and was not merely the misdemeanour of making a false statement under Section 41 of the above statute (Roscoe, 428).

[*Ct. of S.*]

[*Uncog. Not bailable.*]
[*Warrant.*]

*467. Whoever forges (463) a document (29) which purports to be valuable security (30) or a will (31), or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money, movable property (22), or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine (*or with whipping in addition if previously convicted of the same offence*, VI, 4).

When a charge of forgery is made, it is not absolutely necessary that the document said to be forged should be produced in evidence. The confession of the accused person held to be proof of the existence of the *corpus delicti* (3 N. A., N. W. P., 213, Part IV, 1863).

The forging of a document which purports on the face of it to be a copy only, and which, even if a genuine copy, would not authorize the delivery of movable property, is not punishable under this section (5 Bo. H. Ct. R., 56, Part II).

The fraudulent alteration of a Collectorate *Challan* is a forgery of a document as described in this section (*Queen v. Hurish Chunder Bose* (W. R., 22, 1864).

[Cl. of S.]

[Uncog. Not bailable.]
[Warrant.]

*468. Whoever commits forgery (463) intending that the document forged (470) shall be used for the purpose of cheating, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine (*or with whipping in addition if previously convicted of the same offence*, VI, 4).

Forgery for the purpose of cheating.

[Cl. of S.]

[Uncog. Bailable.]
[Warrant.]

*469. Whoever commits forgery (463) intending that the document forged (470) shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine (*or with whipping in addition if previously convicted of the same offence*, VI, 4).

Forgery for the purpose of harming the reputation of any person.

“A forged document.” 470. A false document made wholly or in part by forgery is designated “a forged document.”

A Government promissory note is not a “corody,” and therefore not immovable (5 W. R., 141).

[Cl. of S.]

[Uncog. Bailable.]
[Warrant.]

*471. Whoever fraudulently (25) or dishonestly (26) uses as genuine any document (29) which he knows or has reason to believe to be a forged document (470) shall be punished in the same manner as if he had forged such document (*vide* Section 465).

Using as genuine a forged document.

Fraudulently or dishonestly.—The using of a forged document to be an offence must be proved to have been used fraudulently or dishonestly (8 W. R. C. R., 81).

Uses.—A deed of divorce is a “valuable security” within the meaning of Section 30, P. C. The presenting of a forged document of such a nature for registration and obtaining registration would be “using” within this section (11 W. R. Cr. R., 16).

As genuine.—Whereupon a charge under Section 471, P. C., comparison is instituted between a seal admittedly genuine and the seal impugned as a forgery, the former cannot, if the accused dispute its authenticity, be said to be “undisputed” (18th June, 1866, 2 R. C. C. R. 2).

Which he knows.—In a case in which the accused was charged with dishonestly using as genuine a pottah which he knew to be forged, and in which there was a fraudulent insertion, it was held that it was not necessary to prove that he personally inserted the word, but it was sufficient if it was inserted with his knowledge (9 W. R., 22). To support a conviction under this section there must be a using of a document by a person who knows or has reason to believe that it is forged (17 W. R., 32).

Sanction given by Civil Court.—Where a Civil Court by letter gave sanction for the prosecution of accused under Sections 463 and 471, Indian Penal Code, and where the Magistrate in committing the accused for trial, in addition to framing a charge under these sections, added a head of charge under Section 193, *ante*. Held, that the Magistrate had no jurisdiction to commit the accused for trial on the last-mentioned head of charge; that, by the Civil Court's letter, the investigation was limited to offences against the two sections of the Penal Code therein quoted, and that they were not at liberty to treat the mention of them as surplusage (8 Bo. H. C. R. 29). The contrary opinion was held *in re* the petition of Jayasing Haribhar. *Vide* (8 Bo. C. R., 31) note by Reporter.

An accused cannot be tried for fabricating a legal document without sanction of the Court before which the offence was committed, if the forgery was committed before 1st January, 1862 (1 R. C. C. R., 31).

Forged such document.—A false alteration of the Police Diary by a head constable was held to fall under this section, as the forgery of a document made by a public servant in his official capacity (11 W. R., 44).

A person may be convicted of using as genuine a document which he knew to be forged, though he in the first instance produced only a copy of it (6 W. R., 41).

The presentation of a false or forged certificate of character for the purpose of procuring employment would come under this section.

[*Ct. of S.*]

[*Uncog. Not bailable.*]
[*Warrant.*]

*472. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, *intending that the same shall be used for the purpose of committing any forgery (463) which would be punishable under Section 467 (forgery of a valuable security), or*

Making or possessing a counterfeit seal, plate, &c., with intent to commit a forgery, punishable under Section 467.

with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Intending that the same shall be used, &c.—Counterfeit seals and forged documents were found in the prisoner's possession; and as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently (2 W. R., 5).

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery (463) which would be punishable under any section of this chapter (XVIII) other than Section 467 (forgery of a valuable security), or with such intent has in his possession (27) any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing a counterfeit seal, plate, &c., with intent to commit a forgery, punishable otherwise.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*474. Whoever has in his possession (27) any document (29), knowing the same to be forged (470) and intending that the same shall fraudulently (25) or dishonestly (24) be used as genuine, shall if the document is one of the description mentioned in Section 466 (forgery of a record of Court of Justice, or of a public Register of Births, power of attorney, &c.), be punished with imprisonment of either description for a term which may extend to seven

Having possession of a valuable security or will known to be forged with intent to use it as genuine.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

years, and shall also be liable to fine; and if the document is one of the description mentioned in Section 467 (forgery of a valuable security), shall be punished with transportation

for life, or with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Intending fraudulently to use as genuine.—It is not sufficient for a conviction under this section to say that the prisoner might possibly have used an altered document. The guilty intent must be *proved*, not *inferred* (W. R.).

[*Ct. of S.*]

[*Uncog. Not bailable.*]
[*Warrant.*]

*475. Whoever counterfeits upon or in the substance of any material any device or mark used for the purpose of authenticating any document (29) described in Section 467 (forgery of a valuable security), intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who with such intent has in his possession (27) any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

Counterfeits, &c., any device or mark.—In order to a conviction under this section, the document which the accused has in his possession must have some counterfeit device or mark on it, and it must be proved that the accused has the document in his possession with the intent of using such device or mark for the purposes of giving the appearance of authority to the document. The document must be of the nature mentioned in Section 467, *ante* (15 W. R., 19).

[*Ct. of S.*]

[*Uncog. Not bailable.*]
[*Warrant.*]

*476. Whoever counterfeits upon or in the substance of any material any device or mark used for the purpose of authenticating any document (29) other than the documents described in Section 467 (forgery of a valuable security), intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such

Counterfeiting a device or mark used for authenticating documents other than those described in Section 467, or possessing counterfeit marked material.

material, or who with such intent has in his possession (27) any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description (53) for a term which may extend to seven years, and shall also be liable to fine.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*477. Whoever fraudulently (25) or dishonestly (24), or with intent to cause damage or injury (44) to the public (12) or to any person (11), cancels, *destroys*, or defaces, or attempts to cancel, destroy, or deface, or secretes, or attempts to secrete, any document which is or purports to be a will (31), or an authority to adopt a son, or *any valuable security* (30), or commits mischief (425) in respect to such document, shall be punished with transportation for life, or with imprisonment of either description (53), for a term which may extend to seven years, and shall also be liable to fine.

Destroys any valuable security.—Tearing up a pottah is the destruction of a valuable security, within the meaning of this section (3 W. R., 38).

OF TRADE AND PROPERTY MARKS.

By 25 and 26 Vict., chap. 88, the Merchandise Marks Act of 1862, any person who forges or counterfeits, or causes to be so done, any trade mark, is guilty of a misdemeanour; and any person selling or exposing for sale articles with forged or counterfeit trade marks, or knowing the articles so exposed to have counterfeit trade marks, are liable to forfeit a penalty equal to the value of the articles sold, and a sum not exceeding £5, or less than ten shillings. Any person having sold an article having a false trade mark, is bound to give information where he procured it, and in default is liable to a penalty of £5 for refusal. For marking any false indication of quantity, measure, or weight, &c., upon any articles, with intent to defraud, a like penalty is incurred; and for selling or exposing for sale such articles a like penalty is provided. Persons committing the above offences are liable also to an action at law for damages, and to proceedings in equity. Any person aiding, abetting, counselling, or procuring another to commit any of the above, is also guilty of a misdemeanour.

The following sections of the Penal Code do not make penal false statements as to quantity, measure, or weight, as does the above-quoted Marks Act, Section 7; such fraud is punishable as cheating under I. P. C.

478. A mark used for denoting that goods have been made or manufactured by a particular person (11) or at a particular time or place, or that they are of a particular quality, is called a *trade-mark*.

Trade-mark.

Trade-mark.—This section contains the Penal Code definition of a *trade-mark*. In *re* The Leather Cloth Company, Limited, *n.* The American Leather Cloth Company, Limited, the word “trade-mark” was defined as “the designation of marks or symbols applied to a vendible commodity.”

479. A mark used for denoting that movable property belongs to a particular person (11) is called a *property-mark*.

Property-mark.

Property-mark.—This section contains the definition of a “*property-mark*,” there is one point to be borne in mind with reference to the definitions of *trade-mark* and *property-mark*. In these sections the verb “to use” is employed in the past tense. A trade or property mark is a mark already in use in respect of some particular goods or person; a mark which has never been used, but is intended for future use, is not a trade or property mark under the above definitions.

480. Whoever marks any goods, or any case, package, or other receptacle containing goods, or uses any case, package, or other receptacle with any mark thereon, with the intention of causing it to be believed that the goods so marked, or any goods contained in any such case, package, or receptacle so marked, were made or manufactured by any person (11) by whom they were not made or manufactured, or that they were made or manufactured at any time or place at which they were not made or manufactured, or that they are of a particular quality of which they are not, is said to use a false trade-mark (478).

Using a false trade-mark.

481. Whoever marks any movable property (22) or

Using a false property-mark. goods, or any case, package, or other receptacle containing movable property or goods, or uses any case, package, or other receptacle having any mark thereon, with the intention of causing it to be believed that the property or goods so marked, or any property or goods contained in any case, package, or other receptacle so marked, belong to a person (11) to whom they do not belong, is said to use a false property-mark (479).

[M. of 1st or and
Class.]

[Uncog. Bailable.]
[Warrant.]

*482. Whoever uses any false *trade-mark* (480) or any false *property-mark* (481) with intent to deceive or injure (44) any person (11), shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Punishment for using
a false trade or property
mark with intent to
deceive or injure any
person.

Trade-mark, property-mark.—I have as yet come across no recorded criminal cases in the Indian Reports bearing on these sections, and so have gone to the Merchandise Marks Acts, 1862, and the law as laid down by the English Courts on the points herein referred to. The first question to be decided is, what constitutes property in any particular trades, or property-mark? The answer I give in Westbury, L. C.'s words, *in re The Leather Cloth Company, Limited, v. The American Leather Cloth Company, Limited*, "Property in a trade-mark is the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture, or vendible commodity; consequently, the use of the same mark in connection with a different article is not an infringement of such right of property. If, therefore, the trade-mark contains in itself a clear and distinct description of the commodity to which it is affixed, it is not pirated by the use of a mark which, although in other respects similar, does not contain or give the same description, and which is impressed upon an article which is not of the nature or quality so described." This answers the above query in plain words. In *Hyde's Re.*, 185, it is laid down that "the ground upon which a person is restrained from using another's trade-mark is that he is gaining an advantage by the use of a particular trade-mark which is the property of another. It is not necessary to prove intentional fraud, or to show that persons have been actually deceived. It is sufficient if the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. *Ewing v. Grant, Smith & Co.*, and *in re Graham & Co. v. Kerr, Dods & Co.*, in an application for an injunction to restrain the use of a trade-mark, Phear, J., said, "It is not enough to

say that there was no fraudulent intention. That is no reason why an injunction should not be granted; if the marks which defendants have used are those of the plaintiffs, no matter what their intention was, a perpetual injunction would be granted.

[*M. of 1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Warrant.*]

*483. Whoever, with intent to cause damage or injury (44) to the public (12) or to any person (11), knowingly counterfeits any trade (478) or property mark (479) used by any other person, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Counterfeiting a trade or property mark used by another, with intent to cause damage or injury.

[*Ct. of S. or M. of 1st Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*484. Whoever, with intent to cause damage or injury (44) to the public (12) or to any person (11), knowingly counterfeits any property-mark (479) used by a public servant (21), or any mark used by a public servant to denote that any property has been manufactured by a particular person, or at a particular time or place, or that the same is of a particular quality, or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description (53) for a term which may extend to three years, and shall also be liable to fine.

Counterfeiting a property mark used by a public servant, or any mark used by him to denote the manufacture, quality, &c., of any property.

[*Ct. of S. or M. of 1st Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*485. Whoever makes or has in his possession (27) any die, plate, or other instrument for the purpose of making or counterfeiting any public (12) or private property (479) or trade mark (478), with intent to use the same for the purpose of counterfeiting such mark (478-9), or has in his possession

Fraudulent making or having possession of any die, plate, or other instrument for counterfeiting any public or private property or trade mark.

any such property or trade mark with intent that the same shall be used for the purpose of denoting that any goods or merchandise were made or manufactured by any particular person (11) or firm by whom they were not made, or at a time or place at which they were not made, or that they are of a particular quality of which they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.
[Summons.]*]

*486. Whoever sells any goods with a counterfeit property (479) or trade mark (478), whether public (12) or private, affixed to, or impressed upon, the same, or upon any case, wrapper, or receptacle in which such goods are packed or contained, knowing that such mark is forged (463) or counterfeit, or that the same has been affixed to, or impressed upon, any goods or merchandise not manufactured or made by the person (11), or at the time or place indicated by such mark, or that they are not of the quality indicated by such mark, with intent to deceive, injure, or damage any person, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Uncog. Bailable.
[Summons.]*]

*487. Whoever fraudulently (25) makes any false mark upon any package or receptacle containing goods, with intent to cause any public servant (21) or any other person (11) to believe that such package or receptacle contains goods which it does not contain, or that it does not contain goods which it does contain, or that the goods contained in such package or receptacle are of a nature or quality different from the real nature or quality thereof, shall be punished with imprisonment of either description (53) for a term which may extend to three years, or with fine, or with both.

[*Ct. of S. or M. of
1st or 2nd Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*488. Whoever fraudulently (25) makes use of any such false mark with the intent last afore-
Punishment for making use of any such false mark. said, knowing such mark to be false, shall be punished in the manner mentioned in the last preceding section.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.*]
[*Summons.*]

*489. Whoever removes, destroys, or defaces any pro-
Defacing any pro- perty mark (479), intending or knowing it
perty mark with intent to cause injury. to be likely that he may thereby cause injury (44) to any person (11), shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine or with both.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

In their note on this Chapter the Law Commissioners say, "We agree with the great body of Jurists in thinking that, in general, a mere breach of contract ought not to be an offence, but only to be the subject of a civil action. To this general rule there are, however, exceptions. Some breaches of contract are very likely to cause evil such as no damages, or only very high damages, can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation."

In this country there are two Acts which provide criminally for the punishment of servants committing a breach of their contract of service, Act XIII of 1859, and the provisions of this chapter XIX Penal Code. Act IX of 1872 defines and amends certain parts of the law relating to contracts, and is termed the Indian Contract Act.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan. (Para. 9, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

"A contest," says Sconce, "has sometimes arisen, whether the contract between the employer and employed is one of apprenticeship, or of hiring and service. This must depend on the circumstances of each case. Where the main object of the contract between the parties is teaching and learning the master's trade, the contract would be one of apprenticeship; but where the main object is to perform service for the master, for a remuneration, irrespective of any stipulation on the one hand to teach, and on the other to learn the trade, the contract will be one of hiring and service" (S. M. & S., 7).

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*490. Whoever, being bound by a *lawful contract* to render his personal service in conveying or conducting any person (11) or any property from one place to another place, or to act as servant to any person *during a voyage or journey*, or to guard any person or property during a voyage or journey, voluntarily (39) omits (33) so to do, except in the case of illness or ill-treatment, shall be punished with imprisonment of either description (53) for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

Illustrations.

(a.) A, a palanquin bearer, being bound by legal contract to carry Z from one place to another, runs away in the middle of the stage. A has committed the offence defined in this section.

(b.) A, a cooly, being bound by lawful contract to carry Z's baggage from one place to another, throws the baggage away. A has committed the offence defined in this section.

(c.) A, a proprietor of bullocks, being bound by legal contract to convey goods on his bullocks from one place to another, illegally omits to do so. A has committed the offence defined in this section.

(d.) A, by unlawful means, compels B, a cooly, to carry his baggage.

B, in the course of the journey, puts down the baggage and runs away. Here, as B was not lawfully bound to carry the baggage, he has not committed any offence.

Explanation.—It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

Illustration.

A contracts with a Dâk Company to drive his carriage for a month. B employs the Dâk Company to convey him on a journey, and during the month the company supplies B with the carriage, which is driven by A. A, in the course of the journey, voluntarily leaves the carriage. Here, although A did not contract with B, A is guilty of an offence under this section.

Lawful contract.—Under this section there must be a lawful contract. It is not necessary that every term of the contract should have been expressly agreed upon, for the law will imply that the ordinary incidents of well-known classes of service were included when the general contract for that particular class of service was made; but there must be enough of the contract proved to allow the Court to draw the necessary inferences of fact. The contract must also be lawful; that is, for a lawful object. Thus it is conceived that a contract to convey stolen or smuggled goods from one place to another would not be lawful, and that a person who made such a contract could not be punished under this section if he broke his contract in the middle of the journey. So, too, seeing that every contract imports a consideration, it is necessary that the consideration should be a good consideration—that is, a lawful one, one which the law does not prohibit—for the Courts would not enter into the sufficiency of the consideration, as that is a matter entirely to be determined between the employer and the employed; in fact, it is very probable that the Court would only look to the voluntary engagement of the servant and the trust reposed in him by the master consequent thereupon, as that would be a sufficient contract (see Chitty on Contracts, 8th edition, 29—32), and not go into the question of consideration except for the purpose of seeing that it was not an unlawful one. There is no illustration appended to these sections of what a lawful contract is, and the only reference made to the lawfulness or unlawfulness of a contract is in Illustration (a) to Section 490, which is a case in which there was no contract at all in existence.

A contract having been proved, the next thing is to show a breach thereof, *i. e.*, that the defendant voluntarily omitted to perform it. This may be either by an actual refusal in words, or by absenting himself when required to carry out the contract. Except in one case the time of the act constituting the breach is unimportant so long as it is after the making of the contract. It is immaterial whether the breach be by a non-commencement of the contract or by a cessation of it. It is equally a breach whether,

having made a contract, the contractor does not come at the time specified to commence his work, or, having commenced it, he leaves off in the middle. The exception is where no consideration is to pass from the employer to the employed, and there the work must have commenced: the employer must have actually reposed trust in the servant by committing to his care his own property or person, or the person whom the servant is to take charge of. "An action will not lie for *not* doing a thing where there is no consideration, such as reward, to uphold a promise to do it; yet, where there is a *delivery* of goods and chattels or moneys to a person who undertakes to do something respecting them, even without any reward for his trouble, an action will lie on this bailment if there be a neglect in the management, by which the goods are spoiled, or the like" (5 M. J., 40).

During a voyage or journey.—It is very doubtful whether the words "during a voyage or journey" do not limit the offence made punishable under this section to offences against travellers (5 R. C. C. R., 29).

A servant or other person who engages for a journey, or to attend on a sick person, or a labourer who has received an advance, or has been conveyed at the master's expense on an engagement for a term, can be punished under this section. The mere desertion of a servant who was engaged for a specified time, or a monthly servant without the notice required by law, can only be made the subject of a civil action (Mr. Campbell's Circulars, J. C. O., 87).

General notes.—In general, a mere breach of contract ought not to be an offence, but only the subject of a civil action. To this rule there are exceptions. Some breaches of contract are very likely to cause evil, such as no damages can repair, and are also likely to be committed by persons from whom it is improbable that any damages can be obtained. Such breaches of contract are proper subjects for penal legislation (Law Commissioners' Report, Note P., 115).

The Madras High Court, in their Ruling of 1864, held that this section did not apply to servants hired by the month, whose engagements terminated by a month's notice.

An agreement for personal service in consigning indigo from the field to the vats is not a contract, the breach of which is punishable by this Section 490, P. C. (6 W. R., 80; *in re* Nowa Tewaree and Mullen Jha).

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*491. Whoever, being bound by a *lawful contract to attend on or to supply the wants* of any person (11), who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own

Breach of contract to
attend on and supply
the wants of helpless
persons.

wants, *voluntarily* (39) *omits* so to do, shall be punished with imprisonment of either description (53) for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

With reference to the reason for framing this section, the Commissioners remarked:—"Persons who contract to take care of infants, of the sick and helpless, lay themselves under an obligation of a peculiar kind, and may with propriety be punished if they omit to discharge their duty. . . . They generally come from the lower ranks of life, and would be unable to pay anything. They therefore proposed to add to this class of contracts the sanction of the penal law" (Law Commissioners' Report).

Lawful Contract to attend on or to supply the wants.—Under Section 491 there are no exceptions to the duty cast upon the servant of fulfilling his contract. While it is in force, and the servant is physically able to perform it, it is incumbent on him to do so. This severity, it will be seen, is absolutely necessary when the helpless character of those whom he has to take charge of is taken into consideration. In this case great care is necessary to settle the terms of the contract, because the servant is only liable within its limits. Thus, a person engaging to attend on an infant is not thereby bound to supply it with food, and, if those who entrusted it to him do not provide food for it, he is not bound to do so; and if the child dies from starvation in consequence, he is not legally liable, although morally he may be liable to severe censure. The section itself points out two classes of contracts, viz., to attend on, and to supply the wants of, helpless persons, and these may be joined together in one, or they may be separate.

No mere breach of contract on the part of the master, such as non-payment of wages, &c., will excuse a breach of contract on the part of the servant. Nothing less than an absolute rescission of the contract will free the latter; except under Section 490, where ill-treatment is specified as an excuse for non-performance of the contract. Looking, however, at the English decisions, it may be presumed that there could be no conviction under these sections if the defendant left his service under a *bonâ fide* belief that the law allowed him to do so; but, then, it must be most distinctly shown that the omission was in pursuance of his supposed right, and not merely that he might possibly have acted under such a belief (see *Willett v. Boote*, 30 Law Journal, N.S. Mag. Cases, 6). Such a case might arise where there were continuous breaches of contract on the part of the master, such as non-payment of stipulated remuneration, and the servant imagined that the law thereupon allowed him to treat the contract as rescinded. This case would, however, require much careful consideration in consequence of the words "or other reasonable cause" being omitted from these two sections (5 M. J., 41).

Voluntarily omits.—It has been remarked above that the exception noted in the preceding section as to illness or ill-treatment is omitted in this section. Nevertheless, in order to procure a conviction under this section, a criminal intent in omitting to do what he is bound by law to do

must be proved ; there must be an intention to break the law or neglect the duty required by this section, and evidence should be recorded to prove that there was no reasonable cause for the voluntary omission herein made penal ; e.g., a dhai hired on a monthly salary to supply lacteal sustentation to an infant voluntarily, and, without any reasonable cause, runs away, she can be punished under this section.

[M. of 1st or 2nd
Class.]

[Uncog. Bailable.]
[Summons.]

*492. Whoever, being bound by *lawful contract in writing to work* for another person (11) as an artificer, workman, or labourer, for a period of not more than three years, at any place within British India (15) to which by virtue of the contract he has been or is to be conveyed at the expense of such other, *voluntarily* (39) *deserts the service* of that other during the continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform, such service being reasonable and proper service, shall be punished with imprisonment of either description (53) for a term not exceeding one month, or with fine not exceeding double the amount of such expense, or with both ; unless the employer has ill-treated him or neglected to perform the contract on his part. (*Triable summarily* under Section 222, C. C. P.)

Artificers.—Persons who are masters of their arts, and whose employment consists chiefly in manual labour (5 Geo. IV, Chap. 97, and 6 Geo. IV, Chap. 135 ; W. L. L., 90).

Labourers.—Servants in husbandry or manufactures, not living *intra mania* (W. L. L., 525. *Vide* note on Section 117, P. C.).

Lawful contract in writing.—The contract referred to in this section must be in writing. It must relate to services to be performed in a place other than that at which the servant is living when the contract is entered into, and to which he “is to be, or has been, conveyed at the expense of the master.” I apprehend the words “in writing” should govern the word “contract” or “contracted” throughout the section. The writing, therefore, should show the nature of the employment ; the names of the parties intended to be bound, both of the employer and employed ; the place from which the servant is to be, or has been, conveyed ; the place where work is to be performed ; the rate of wages or other consideration which the servant is to receive ; and generally what each party undertakes to perform in pursuance of the contract. Probably it is not necessary that the “contract in writing” should be contained in one writing : if in a

number of documents (e.g., letters between the parties) on the face of them, connected in their sense, the whole contract shall appear (S. M. and S., App., xxxvi.).

A labourer once punished under this section cannot receive a second punishment on his refusal to complete the same contract, and on his release from first term of imprisonment (Letter No. 611, 1863, Vol. II, 24, R. J. P. J.). In England, *in re Unwin v. Clarke* quoted under this section, the Contract of Service has been held not to be terminated by conviction and punishment.

To work as.—See Act XIII of 1859. That Act does not apply to contracts for a domestic or personal service, but to contracts to serve as artificer, workman, or labourer (12 W. R., 12). Coolies in Assam, who have received advances in contemplation of work to be done, may be proceeded against under Act XIII of 1859 (*Queen v. Gaub Gorah*, 8 W. R., 6). Act XIII of 1859 relates to fraudulent breaches of contract, and does not apply where an advance has not only been worked off by a labourer, but an actual balance is due to him (*Taradoss Bhuttacharjee v. Bhaloo Sheikh*, 8 W. R., 69). There is a slight difference between this and the two preceding sections. In those sections, the offence consists in voluntarily omitting to do that which the accused has contracted to do, but in this section the words “without reasonable cause” are introduced.

The provisions of Act XIII of 1859 (an Act for the punishment of breaches of contract by artificers, workmen, and labourers) have been extended to the station of Almorah in the Kumaon district. The Senior Assistant Commissioner of Kumaon has been authorized to exercise the power vested in a Magistrate of Police under that Act.

Voluntarily deserts the service.—If the omission on the part of the servant to carry out his contract arose from an accident, or superior force, or mistake, or the fraud of a person other than himself, it would not be voluntary, and he would be relieved from criminal responsibility. In Section 490 the words “or without reasonable cause” are introduced, whereas in Section 490 no excuse but illness or ill-treatment is admitted, and in Section 491 there is no exception to the duty of fulfilling the contract specified. Doubtless this arose from the fact that the urgency was greater under these sections than under that, and, therefore, no chance should be allowed to the servants to manufacture a “reasonable cause.” A servant who, having, made a contract to serve during a voyage, refused to go on board during a hurricane, his master being desirous of going, or one who refused to pass through or remain a reasonable time in a district where cholera was raging, would be liable. If, however, the master knew of these facts before or when he made the contract, and concealed them from the servant, it is a very great question whether the contract would not be entirely vitiated and the servant be at liberty to go wherever he pleased. A question might also arise whether a servant would be liable who ran away during a journey on the approach of a tiger, unless the contract was expressly to guard as well as conduct, for self-preservation is the first law of nature; besides, the fact of the servant standing his ground might result in his being eaten up, and thus

the master would be permanently, instead of temporarily, deprived of his services (5 M. J., 41).

In re Unwin v. Clarke, I. L. R. Q. B., 417, a workman entered into a contract with a master to serve him for the term of two years : he absented himself during the continuance of the contract from his master's service, and under 4 Geo. IV., c. 34, sec. 3, he was summoned before Justices, convicted and committed. After the imprisonment had expired, and while the term of the contract was still unexpired, he refused to return to his master's service, and was again summoned before Justices, when he stated that he considered the contract determined by the commitment ; the Justices found that he *bonâ fide* believed that he could not be compelled to return to his employment, and dismissed the summons. Held by Blackburn and Mellor, JJ., that, although the servant had not returned to the service, yet as the contract continued, he had been guilty of a fresh offence, for which, notwithstanding his conviction and imprisonment, he could be again convicted, and that his *bonâ fide* belief that he could not be compelled to return to his employment did not constitute a lawful excuse for his absence.

The Section (4 Geo. IV., c. 34, sec. 3) under which the prisoner was convicted, is a peculiar one. It enacts that—"If any servant, &c., shall contract with any person to serve him, and shall not enter into his service, according to his contract (such contract being in writing and signed by the parties), or having entered into such service shall absent himself from his service before the terms of his contract (whether such contract shall be in writing or not) shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanour in the execution thereof, then it shall be lawful for any Justice of the Peace, on proof before him, to commit every such person to the House of Correction for a reasonable time, not exceeding three calendar months, and to abate a proportionable part of his wages for and during such period as he shall be so confined, or in lieu thereof, to punish the offender by abating the whole or any part of his wages, or to discharge him from his contract, which discharge shall be given under the hand and seal of the Justice gratis." The Justices had not discharged the contract, which was therefore held to be continuing.

Shee, J., said :—"If he had returned to the service, and then left it again, he might have been punished again ; but having originally declared he would never come back, I think his non-return was not a fresh absence, and that he was not punishable a second time. The weight of authority is against this view, but I agree with Pollock, C. B., and Mellor, B., in *ex parte Baker*, 26 L. J. M. C., 155 ; 2 H. and N., 219. A man ought not to be convicted of a purely statutable misdemeanour, unless he has the *mens rea*. Here the respondent really believed he was justified in not returning, and acted *bonâ fide*, and, therefore, ought not to have been convicted. As my brothers are of a different opinion, and the weight of authority is in favour of the appellants, I do not wish to formally differ from the judgment of the Court." *Unwin v. Clarke* is very distinguishable from any case likely to arise under Section 492 of the Penal Code unqualified by any other enactment.

In a charge under this section the views expressed by Shee, J., in *Unwin v. Clarke*, would probably be adopted and acted upon, wherever the case did not come under some other special law. For example, by Section 41, Act VI of 1865, B.C., the conviction of a labourer for breach of his contract does not operate as a release from the contract, but the labourer is after the completion of his sentence to be handed over to his employer, and by Section 42 of the same Act, the term of the contract "shall extend to such further period as shall be equivalent to the aggregate amount of the imprisonments and unlawful absences endorsed on the contract."

Supposing that a return to service by the servant after conviction would be a commencement of a fresh service, I do not suppose that a new contract in writing would be necessary. The old contract would govern the renewed service under it; and would be good for so long as it was originally intended to last according to its terms.

It is to be observed that by the words of the section, the work must be performed "at any place within British India," but nothing is said about the place from which the servant is to be conveyed. A question, therefore, arises if "an artificer, workman, or labourer" "has been conveyed," at his employer's expense, say, from England to work in Bengal, and, after arriving in Bengal, omits to do his work, can he be convicted under this section? I believe that he could; although for any breach of the contract committed beyond the territories to which the Penal Code applies (*e. g.*, refusing or omitting to quit England), no criminal proceedings could be taken against him under it.

A servant charged under this section might plead non-payment of wages as a "reasonable cause" for not performing his part of the contract. In *Vittaba Malhari v. Corfield* (3 Bo. H. C., App. 25) Jackson, J., said: "Was it not a sufficient answer for the plaintiff (*i. e.*, the servant) to make to the charge of leaving his employment without warning, that he had not been paid his wages due to him? A servant is not bound to serve unless he is paid. To hold otherwise would be to reduce servants to the condition of slaves, and the regulation (Rule, Reg. & Order 1 of 1814, relating to Bombay) is careful in this respect to protect servants by inserting the words 'unless it be for some just and reasonable cause.'"

Labourers under Act III of 1863 (B.C.) and Act VI, 1865 (B.C.) would be punishable under this section of breach of the written contract entered into by them, if such contract did not extend over three years.

S. M. & S., App. xxxvi, xxxvii.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

Section 5. Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of discipline, with a light rattan (Para. 6, Circular No. 2, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

Act III of 1872 was passed to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Mahomedan, Parsi, Buddhist, Sikh, or Jaina religion, and to legalize certain marriages the validity of which was doubtful.

Hindoo law is not a territorial law, like the law of England or the P. C. in India, nor is it a personal law from which a man could not withdraw himself. The omission in Act XXI, of 1850, of all reference to the subject of marriage did not arise from inadvertency, but that the authors of that Act evidently thought that when a man exercised the right assured to him by the Act of changing his religion, he acquired by that very circumstance the right to form a contract of marriage in ways other than those authorized by Hindoo law. In India there is no fundamental common law other than the law of justice, equity, and good conduct on the subject.

Differences between personal and territorial law.—The main point in which personal differs from territorial laws is, that whereas the latter bind all persons within a given territory whether they like it or not, such systems of personal law as we have in India must, from their nature, admit of a choice. If you have two or more parallel systems of personal law, and if there are no means of deciding which of them applies to any particular person, the only means of arriving at such a decision will be by considering what mode of life he has, as a matter of course, adopted. If these systems of law correspond to two different and antagonistic religions (as is the case with H. and M. Law), it is necessary either to forbid a man to change his religion or to permit him to change his law. Act XXI of 1850 adopted the second branch of the alternative. The effect of this enactment deserves attention.

Sanctions in all cases are the essence of laws, the unfailing tests by which they are distinguished from other rules of conduct.

The subject matter of the personal laws which exist in B. I. (marriage

inheritance, caste, &c.) does not admit of their being invested with the penal sanction. Their sanction is in the fact that if they are observed certain civil rights are established, and that if they are not observed those civil rights are forfeited. The *Lex Loci* Act did in fact, deprive the native religions of the character of law as against those who might cease to profess them, and left to them only the character of rules of life, which persons inclined to do so might adopt or relinquish at their pleasure. This principle has been laid down in the fullest and most emphatic manner by the Privy Council in *re Abraham v. Abraham*. (For full particulars of this line of argument, see Mr. Stephen's exhaustive speech on the Native Marriage Bill, *Gazette of India*, 27th January, 1872, Supplement, 57—82).

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*493. Every man who *by deceit* causes any woman who is not lawfully married to him to believe that she is lawfully married to him, and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.

By deceit.—Compare this section with Section 496, the two sections are somewhat alike; the difference appears to be that under this Section 493, deception is requisite on part of the man, and cohabitation or sexual intercourse consequent on such deception. The offence under Section 496 requires no deception, cohabitation, or sexual intercourse as a *sine qua non*, but a dishonest or fraudulent abuse of marriage ceremony. In the latter case the offence can be committed by a man or a woman, in the former only by the man.

[*Ct. of S.*]

[*Uncog. Bailable.*
[*Warrant.*]

*494. Whoever, having a husband or wife living, *marries* in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and also be liable to fine.

Marriage again during the lifetime of husband or wife.

Exception.—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a

former husband or wife, if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such takes place, inform the person with whom such marriage is contracted of the real state of facts, so far as the same are within his or her knowledge.

“*Marries*,” that is, “goes through the form and ceremony of marriage with another person” (*vide* R. v. Allen, Court of Crown Cases Reserved, 23 May, 1872).

The English Legislature has thought it just to make bigamy a felony, by reason of its being so great a valuation of the public economy and decency of a well-ordered State. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife ; but the second may, for she is indeed no wife at all ; and so *vice versa* of a second husband. There are four exceptions in which such second marriage (though in the “second case” it is void) is yet no felony :—

1. The case of a second marriage contracted by any other than a British subject out of England.
2. The case of a person marrying again, whose husband and wife shall have been continually absent from that person for seven years then last past.
3. The case of a person who at time of second marriage shall have been divorced *a vinculo* from the first marriage.
4. The case where former marriage shall at time of second marriage have been declared void by any competent Court.

Is void.—Male Mahomedans and Hindus could never be brought under the provisions of this section, and Mahomedan ladies seldom, if ever, for the reasons that there are several conditions or requisites of a contract of marriage, among which are the following :—(1.) Understanding, puberty, and freedom in the contracting parties, &c. (2.) A fitting subject, *i. e.*, a woman who may be *lawfully* contracted to the man. (3.) The hearing by each of the parties of the words spoken by the other ; and further, the declaration and acceptance must be expressed at the same meeting. (4.) *Shahadut*, or the presence of witnesses. There are four requisites to the competency of witnesses, *viz.*, freedom, sanity, puberty, and Islam. The witnesses *must* hear, and should understand what is said by the contracting parties, but need not see the woman ; if the woman be absent, she must be properly identified to the witnesses. Marriage is contracted by spoken words, and by a dumb person by intelligible signs ; but it cannot be contracted by writing between parties who are present. By Mahomedan law a woman declared to be a man’s wife by the decree of the judge may live with the judgment

debtor, though in point of fact he had never married her ; but in such a case the woman must be a *fitting subject*, and legally competent to enter into the contract, otherwise the judge's decree would not be operative by the Mahomedan Law of Marriage. There are nine classes of women who are unlawful, or prohibited to a man :—(1.) Prohibited by reason of *nush*, or consanguinity. (2.) By reason of affinity ; of these there are four degrees. (3.) By reason of fosterage. (4.) Women who cannot be lawfully joined together. (5.) Female slaves married upon free women, or together with them. (6.) Women prohibited by being involved in the rights of others. (7.) Women prohibited by reason of Polytheism. (8.) Women prohibited by reason of property. (9.) Women prohibited by reason of repudiation. An *invalid* marriage is one that is wanting in some of the conditions of validity ; in this sense every marriage that is unlawful is invalid. Marriage is void (the original word *batil* means vain, futile, ineffectual) only when a man marries a woman whom he is perpetually interdicted from marrying, and only those who are prohibited by reason of consanguinity, affinity, or fosterage can be said to be perpetually prohibited (B. M. L.).

Marriage among *Hindus* is not merely a civil contract, but a Sacrament. It is contracted at an immature age on the part of the infant, and its consummation is postponed until the nubile age ; until such time the girl resides with her own family ; when she reaches maturity it is the duty of the mother to give notice of the fact, when her husband can claim and remove her to his home. Consummation is not necessary to make the marriage valid. Marriage consists of two ceremonies—(1.) Betrothal ; (2.) Consummation. Between each there may be a long interval of years. The betrothal, as it is termed, is in fact, as well as in law, *the marriage* ; although the execution of the contract, consummation, necessarily follows it, it is not essential to the validity of the marriage. Betrothal is absolute marriage, so much so that if a man dies before consummation the girl is entitled to all the rights and incurs all the duties of widowhood : so that the death of the husband will not annul the contract. Formerly she was debarred from contracting a second marriage with a different man, the Hindoo law prohibiting a girl from being more than once married ; but the doctrine that a Hindoo widow cannot re-marry has been abolished by Act XV of 1856. There are eight species of marriage :—(1.) *Brahma* ; (2.) *Daiva* ; (3.) *Arsha* ; (4.) *Pragapataya* (these four are appropriate for Brahmins, or the sacerdotal order, and are based on disinterested motives ; (5.) *Gaudharani*, or love marriages ; (6.) *Racshasa*, or forcible connection, which were peculiar to the Chetryas, or military classes, and are founded, the former on reciprocal desire, and the latter on conquest ; (7.) *Ausora*, appropriate for the *Vysyas*, or the mercantile body, and for *Soodras*, or servile class ; (8.) *Paisacha*, where the marriage may have been effected by fraud, which is reprobated by all classes. *Menu* enjoins that the two latter—Ausora and Paisacha—never be observed. The only circumstance which the courts would consider a justification of the absolute severance of the contract of marriage is the adultery of the wife. In such a case the husband can either absolutely separate from her, or supersede her by another ; in either case she continues to be legally connected with him. There are other causes of separation besides

infidelity, not absolute indeed, or a severance of the marriage tie, but entitling the wife to maintenance. These are mainly caused by the disappointment of the object of marriage, and arise from impotence in the man, confirmed barrenness in the woman, loathsome incurable disease in either, and the like (G. H. L., 4—16).

Amongst the Nayers on the Coast of Malabar there is, *legally* speaking, no such thing as marriage at all. On the principle that you cannot tell who is a man's father, the rule of inheritance is that the sister's son inherits. In spite of this custom, marriage is practically as common, and as binding, amongst the Nayers as in many other races. "Suppose," says Mr. Stephen, in his speech on the Native Marriage Bill, "that these people were to adopt marriage customs of their own,—not, indeed, regulated by our notions, but founded on principles which to them might appear natural. Why should our courts treat such marriages as void?" (See Mr. Stephen's most able speech, *Gazette of India*, of 27th January, 1872, Supplement).

The prisoner's admission deliberately made of a prior marriage in a foreign country is sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place (*Reg. v. Newton*).

By the principles of Mahomedan Law.—The right of a wife to maintenance is expressly recognized: so much so, that if the husband be absent and have not made any provision for his wife, the law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation. There is a recognized species of reversible divorce, which is effected by the husband comparing his wife to any members of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *sihar* (Mac. H. and M. L., 215—219).

By the principles of Mahomedan law marriage is a contract founded on the intention of legalizing generation; proposal and consent are essential to such contract, and the conditions are discretion, puberty, and freedom of contracting parties. Marriage confers on the wife the right of dower and maintenance and habitation (Mac. H. and M. L., 214).

Among Hindoos marriage is not merely a civil contract, but a sacrament. Women are betrothed at a very early age, and this betrothment constitutes in fact marriage. The contract is binding and valid; it is complete and irrevocable on the performance of certain ceremonies (*vide Ward on Hindoos*, Vol. I., 130, *et seq.*) without consummation. In all cases and for whatever cause a wife may have been deserted, she is entitled to sufficient maintenance. In modern practice a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment. Adultery is a criminal but not a civil offence, and an action of damages as preferred against the adulterer by the husband will not lie (Mac. H. and M. L., 60—64). The apostacy of a Hindoo wife does not dissolve the marriage union (*R. v. Must. Ghotam Fatima*, 5 P. R., 51).

The law will presume strongly in favour of the validity of a marriage, especially where a great length of time has elapsed since its celebration ; indeed, the legal presumption as to marriage and legitimacy is only to be rebutted by "strong, distinct, satisfactory, and conclusive" evidence (B. L. M., 911, Ed. IV). By Section 112, Indian Evidence Act, birth during marriage is conclusive proof of legitimacy.

Held, that a woman who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise, and contracts a second marriage within sixteen months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to the enhanced punishment under the following Section 495, P. C. (4 W. R., 25).

In a case under Section 494, proof of both marriages and identity of parties is necessary to support the charge ; an actual ceremony and valid marriage must be proved : it is not sufficient to prove the fact of parties having lived together as man and wife.

A marriage solemnized during the infancy of the parties which has never been consummated by cohabitation is voidable and incomplete ; although a civil action for damages may lie against either party contracting a second marriage, such party is not punishable criminally as for bigamy (2 P. R., 87). This ruling is with reference to Section 6, Clause 12 of Punjab Civil Code.

When a person goes abroad and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of (*Hopwell v. Depinna*). The same rule holds generally with respect to persons away from their usual places of resort, and of whom no account can be given (*Lloyd v. Deakin*). This is incorrectly spoken of in some books as a presumption of law (*Nepean v. Knight*). But it is, in truth, a mixed presumption, said to have been adopted by analogy to the statute of 1 Jac. I, Chap. 11, Sec. 2 (Best P. L. and F., 191).

It is upon this presumption that the exception to this section is founded, whereby a person does not commit bigamy by marrying again in the lifetime of a former husband or wife. *In re Pherres Trusts* the following question arose in connection with it. A person was last heard of in 1858. Of course in 1865 he will be presumed to be dead. The question is raised in 1869 whether he was dead or alive in 1861. Will the Court *presume* that he was alive at that time, or will it throw upon the person interested in asserting it the *onus* of proving that he was alive ? It was well settled long before *re Pherres Trusts* that the Court will not presume that a person is dead at any time during the period of seven years, although it will presume that he is dead at the expiration of it. *In re Pherres Trusts* the Court was asked to presume that a person last heard of in 1858 was alive in 1861. Lord Giffard, J., decided that the Court would not so presume, but that the burden of proving it rested with those interested in asserting it. In other words, although there is a presumption that a person who has not been heard of for seven years is dead at the end of that period, that he was alive or dead at any given date during

that period is not a matter of presumption, but a matter of proof (5 M. J., 161).

The Indian Evidence Act, Section 107, provides for the burden of proof as to continuance of life, and Section 101 as to the burden of proof as to death.

The rule of English law, that a period of seven years' absence without tidings is sufficient to raise a *presumption* of death, is not applicable in the case of a Hindoo. The Hindoo law has a rule of its own, requiring the lapse of twelve years before an absent person, of whom nothing has been heard, can be presumed dead (2 B. L. R., 137; 2 B. L. R., 134; 10 W. R., 484).

Where a Mahomedan wife deceitfully contracts marriage during her husband's lifetime, the offence is not taken out of the purview of Sections 494 and 495, from the fact of second marriage being a Nikah (2 R. C. C. R., 48; also 6 W. R., 60).

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*495. Whoever commits the offence defined in the last

Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.

preceding section, having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description (53) for a term which may extend to ten years, and shall also be liable to fine.

Vide notes on preceding section.

By the provisions of Act V of 1865, Parsees committing bigamy are made subject to the penalties prescribed in this and the preceding Section 494. And Section 16, Act III of 1872, provides that "every person married under that Act who during the lifetime of his or her wife or husband contracts any other marriage, shall be subject to the penalties provided in this and the preceding Section 2. Section 2 of Act XV of 1872, and Schedule V thereto attached, repeal Act V of 1865, except so far as it related to the Straits settlements.

[*Ct. of S.*]

[*Uncog. Not bailable.*
[*Warrant.*]

*496. Whoever dishonestly (24) or with a fraudulent (25) intention goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description

Marriage ceremony gone through with fraudulent intent without lawful marriage.

(53) for a term which may extend to seven years, and shall also be liable to fine.

An abuse of the marriage ceremony, where no deceit is practised on the woman, and no dishonest or fraudulent intent is proved, is not an offence under this Section 496.

[*Cl. of S.*]

[*Uncog. Bailable.*]
[*Warrant.*]

*497. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe (26) to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape (375), is guilty of the offence of adultery, and shall be punished with imprisonment of either description (53) for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

"*Adultery*, or criminal conversation with a man's wife," says Blackstone, "though it is, as a public crime, left to the coercion of the Spiritual Courts, yet considered as a civil injury, the law gives satisfaction to the husband for it by action against the adulterer" (3 Black. Com., 148).

By Foreign Department No. 31 P.—certain Regulations for the peace and government of the districts of Hazara, Peshawar, Kohat, Bunnoo, Dera Ismail Khan, and Dera Ghazee Khan, approved by H. E. the G. G. in Council and published as having the force of law under 33 Vic., Cap. 3, Sec. 1, at page 5 of *The Gazette of India*, dated January 2nd, 1872, Regulation 8 :—

It is laid down that—(8). Any man who has sexual intercourse with a person who is, or whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape; and any married woman who knowingly and by her own consent has sexual intercourse with any man who is not her husband, is guilty of the offence of adultery, and shall be punished with imprisonment of either description which may extend to five years, or with fine or with both.

A and B, Mahomedans married under the Mahomedan law, are converted to Christianity. The wife B is first converted, but continues to live with her husband; subsequently the husband A is converted. Subsequently to the conversion of B, A and B still living together as husband and wife, both professing Christianity, B has sexual intercourse with C. Will a conviction hold against C under Section 497? Both Macpherson and Baillie say the marriage becomes dissolved by apostasy of either party, and Grady in his version of Hamilton's *Hadya*, page 66, says :—"If either husband or wife apostatize from the faith, a separation takes place, without

divorce, according to Haneefa and Abooyssaf.—Mahomed alleges if the apostacy is on the part of the husband. Apostacy annuls marriage in Haneefa's opinion, and in apostacy separation takes place without any decree of the Magistrate." Cases which might decide this point have been lately tried both at Lucknow and Allahabad:—At the former place, *in re* Afzul Hossein *v.* Hadee Begum, and at the latter Zubardust Khan *v.* Wife. But from certain remarks to be found in the judgment of the High Court, N. W. P., the Court of Oudh and N. W. P. appear to differ on the most essential point. The point before the Oudh Court was (Hadee Begum's plea), that her marriage contract was dissolved by reason of her own apostacy, a sufficient answer to a suit brought by her Mahomedan husband for restitution of conjugal rights; *i. e.*, does the apostacy of a Mahomedan wife dissolve a marriage contract against the express wish of a Mahomedan husband in Dar-oll-Hurb (land of war), for India, it is contended, is not, under its present administration, Dar-oll-Islam (land of safety)? The Oudh Court held (admitting that apostacy by the husband dissolved the marriage and freed the wife) that apostacy by the wife did not free her if her husband sued for restitution of conjugal rights. They argued that apostacy by the wife, without the wish of the husband, could not be entertained; in fact, that as regards her husband's volition, the apostacy could not exist, and would not be recognized. That a suit for restitution of conjugal rights before the competent Court of the time seemed to them to be the equivalent of the suit before the Cazi. The Oudh Judges, in the absence of distinct precedent, say they fell back on the customs of the people amongst whom they lived. The Oudh Court evidently considered there was an essential difference between apostacy of a man and apostacy of a woman, of the husband or the wife; also between apostacy to a faith in a book, and apostacy to the idol worship Mahomed and his followers renounce. Does such an essential difference exist? The point before the High Court, N. W. P., was:—Can a Mahomedan professing Christianity subsequent to his marriage with a Mussulmani according to the Mahomedan law, obtain a decree for dissolution of that marriage under Act 4 of 1869, his wife having subsequently to him professed Christianity, and they having under their new faith lived together as man and wife, or whether the wife's contention is sound, that her marriage was cancelled by her husband's apostacy? They held the apostacy of the husband dissolved the marriage tie. This the Oudh Courts admit, but *the point* before the Oudh Court was not before the High Court, N. W. P.; nevertheless from comments made by the High Court, N. W. P., on the Oudh decision, they evidently did not agree with the finding come to by the latter Court on the point before it.

The law allows a person the right to cease to be a Hindoo or Mahomedan in the fullest sense of the word, and to become a Christian, and to claim for himself and his descendants all the rights and obligations of a British subject (Hogg. *v.* Greenway, &c., 2 Hyde's Reports, 3). With reference to Hindoos, upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced the old religion, or if he thinks fit he may

abide by the old law, notwithstanding he has renounced the old religion. The profession of Christianity releases the convert from the trammels of Hindoo law, but it does not of necessity involve any changes of the rights or relations of the converts in matters with which Christianity has no concern. The convert, though not bound as to rights and interests in, and his powers over, property, either by the Hindoo or any positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters (*Charlotte Abraham v. Francis Abraham*, 1 W. R., R. C., 1).

A wife may be deserted on the ground of adultery (see *Shamachurus Vyavastha Darpana*), which is regarded as a criminal offence, but *Nareda* says that a husband who deserts an affectionate or faultless wife shall be brought to his duty by the King with severe chastisement. In Bombay there is a practice of deserted or divorced wives marrying again, under a form of marriage which is of sufficiently frequent occurrence to have a name of its own (1 *Strange's Hindu Law*, 52), viz., *Natra*. But in 1864, in an appeal from a conviction by the Lower Court on a charge of adultery, a defence that a *Natra* marriage had been solemnized between the prisoner and the prosecutor's wife was considered by the Bombay High Court (*R. v. Kassan Goja*; *R. v. Bai Rupa*, 2 Bo. H. C. R., 125). It was alleged to be a custom amongst the caste to which the parties belonged that a woman may, without the consent of her husband, leave him, and contract a valid marriage with another man. "We are of opinion," said the Court, "that such a caste custom as that set up, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindu law, and we hold that a marriage entered into in accordance with such a custom is void." And, generally, according to Hindu law, adultery, though a penal, is an expiable offence, at all events if the parties be of the same caste. The ancient law (9 *Menu*, 178 and 179) prescribes the penance for adulterous connection. Neither adultery nor illegitimacy is, in the eye of Hindu law-givers, the disabling stigma which Codes based upon Christianity have made it. But a woman divorced for adultery, who has continued in adultery during her husband's life and in unchastity after his death, is not entitled to maintenance after his death (*C. H. L.*, 170).

Conviction for adultery set aside, proof of the marriage of the alleged adulteress not having been adduced, and the ostensible husband having withdrawn or wished to withdraw from the prosecution (*I. R. C. C. R.*, 3).

Where a prisoner accused of adultery sets up in defence a *Nátrá* contracted with the woman with whom he is alleged to have committed adultery, in accordance with the custom of his caste, the question the Court has to determine is, whether or not the accused *honestly believed* at the time of contracting the *Nátrá* that the woman was the wife of another man (*Reg. v. Manohar Raiji*, Bo. H. Ct. R., Crown Cases, 17, 1868). The Bombay High Court approved of the withdrawal of a charge of adultery, by the prosecutor, even after the case had been committed for trial by Court of Sessions (*Reg. v. Rambo Jerio*). See note to Section 214, exception *ante*, regarding *compounding*.

The Criminal Court may accede to the application of a prosecutor to withdraw a charge of adultery. The production of marriage certificate, or

other satisfactory evidence of the marriage, is strictly required in indictments of adultery (No. 1144, High Court, Calcutta, 15th December, 1865).

"A charge of an offence under Section 497, I. P. C., shall not be instituted except by the husband of the woman, *or any person under whose care she was living at the time when the adultery was committed*" (Section 478, C. C. P.). The law on this subject before the passing of Act X of 1872, the C. C. P., was, that only the husband of the woman with whom adultery had been committed could prosecute, and before the passing of Act XXV of 1861, under the old law, prosecution for adultery could not be instituted except by the husband. (*Vide* Act II, 1845. The words here given in italics were added by Act X of 1872.)

[M. of 1st or 2nd
Class.]

[Uncop. Available.]
[Warrant.]

*498. Whoever takes or entices away any woman who is and whom he knows or has reason to believe (26) to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

By English law, the taking away referred to in the Section 498 is termed "*abduction*," and may either be by fraud and persuasion, or open violence; the law supposes force and restraint, the wife having no power to consent (3 Black. Com., 148).

In the matter of Khatija Babi. By English law a return to a writ of *habeas corpus* may be met by confession and avoidance (Bacon's Abr., title *Habeas Corpus*, 135). The writ of *habeas corpus* is a proceeding simply intended to vindicate the personal liberty of the subject (see Hottentot Venus, 13 East, 195), and not in order that the individual rights of private individuals to the custody of any person may be tried. By English law the detention of the wife without the consent of the husband is detention against her own will, she being presumed to be under his control, so the writ of *habeas corpus* became applicable on this principle between husband and wife (Bacon's Abr., title "Baron and Feme," C. and G., 694—710). But by Mahomedan law the rights of the husband and wife are perfectly distinct in every relation of life (11 Moore's I. A., 551). The mother is the proper guardian of the female children until they arrive at puberty (*in re* Thayet Ali, 2 Hyde, 63; Hedaya, B. IV, Cap. XIV, 385). The earliest stages at which consummation is legal is fixed by Section 365, P. C., *ante*, at ten years. A wife is not entitled to maintenance from her husband if she is too young to be capable of gene-

ration (Baillie's M. L., 437 ; Hedaya, B. IV, Cap. XV, 394) ; unless she is incapable through sickness. The husband must pay the dower before he can claim his wife, and in cases where the dower is not fixed the wife is entitled to her proper dower, B. M. L., 124, 125, and where it is not fixed it must be prompt and not deferred (Mac. M. L., 381, Case 31). Dower is not absolutely essential to the validity of the marriage (Hedaya, B. II, Cap. III, 122). Non-payment of dower is a bar to enforcing co-habitation, or if it is enforced the wife's former guardian may take her back until payment is made (M. L. B., 125). The return to a writ of *habeas corpus* is not necessarily conclusive, and does not preclude inquiry into the truth of the matters alleged therein, although 56 Geo. III, Cap. 100, does not apply to India (R. v. Vaughan, *in re* S. M. Gumesb Sundari Dabi ; *vide* also *Hottentot Venus*, 13 East, 195). There are three conditions of marriage in Mahomedan law—(1) discretion, (2) puberty, and (3) freedom of will ; the tests of consent are various, and an opportunity for putting these tests in proof should be given (B. M. L., 55—60).

A conviction was maintained where the prisoner had eloped with a woman from a house in Calcutta, hired for her by her husband, who was absent in Assam. The Court said : "We think it clear, a wife living in her husband's house, or in a house hired by him for her occupation, and at his expense, is during his temporary absence living under his protection, so as to bring the case within the meaning of this section, provided, of course, that the defendant knew, or had reason to believe, that she was the wife of a man from whose protection he took her, or on whose behalf the person from whom he took her had charge of her, and also, provided he took her with the intent specified in the Act" To hold otherwise would be to declare the worst cases of seduction not punishable under Penal Code (*Muttee Khan v. Mungloo Khansamah*. See note on Section 366, I. R. C. C. Cr., 45).

The taking away of a woman is an offence under this section, although the advances and solicitation have proceeded from the woman, and the accused may have for a time refused to yield to her (*Reg. v. Kumarasami* ; 2 Madras H. Ct. R., 331). Where a man and woman are perfectly agreed, a third party who goes with the woman from her husband's house is guilty of abetment (*Madras H. Ct.*, 1864).

A married woman cannot abet her own abduction (*Phalla v. Jewan*, 6 P. R. 7). In recent cases in the Punjab it has been held that the woman is not punishable in cases under this section as an abettor (*Monahan v. Gunsham*, 6 P. R., 12).

A charge under Section 498 must be made either by the husband of the woman or by the person having care of such woman on behalf of her husband (Sec. 479, C. C. P.). Where a wife, who had been deserted by her husband, went of her own free will to live with another man. *Held*, conviction under this section would not hold, and must be set aside, as there was no enticing or taking away (*Queen v. Pochan Chung* (2 W. R. C. R., 35). It was also held in the same case that a person convicted under Section 497 cannot be convicted under Section 498 on the same facts.

When a charge is preferred by a woman's husband, and the circumstances are such that sexual intercourse between her and the accused person may be presumed to have taken place, the latter should be committed for trial, and it will be for him to rebut that presumption before the Sessions Court (J. C., O., Book Circular No. VIII, No. 21-448 of 1868, dated 28th May). The above circular, though not in so many words, was in fact cancelled by Judicial Commissioners (Book Cir. No. X of 1871). The latter circular ruled "that a *specific* charge of adultery must be laid by the husband of the woman before such a charge can be entertained in a criminal court. It is not sufficient that the husband should institute a charge of enticing or taking away, and incidentally during the hearing of the case, urge that his wife is living in adultery with the person charged. The Court has not the power of amending the charge as laid and converting it into one of adultery, nor has it the power of adding a charge under Section 497 to the specific charge made by the husband of the woman." This latter circular leaves nothing to presumption, and is certainly more in accord with the intention of the Legislature as laid down in Section 177, Act XXV of 1861. Since the publication of the above circular Act X of 1872 has been passed, which alters the law somewhat (*vide* Section 478, Act X of 1872).

On a charge under this section of A and B having detained C's wife in view to A committing adultery with her. *Held*, that physical constraint is not an essential of the offence; that the words of the section, "conceals or detains," are intended to apply to the enticing or inducing a wife to withhold or conceal herself from her husband; that depriving the husband of his proper control over his wife for the purpose of illicit intercourse is the gist of the offence, just as it is of the offence of taking away a wife under the same section; that a detention occasioning such deprivation might be brought about simply by the influence of allurements and blandishments (Case No. 96 of 1867, H. Ct., Madras, 1st May, 1868. 3 *Madras Jurist*, No. 5, 186).

CHAPTER XXI.

OF DEFAMATION.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in this chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first or any other* offence, and is to be administered in the way of school discipline, with a light rattan (para. 6, Circular No. 2,

dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *transportation* or *penal servitude*, or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

Blackstone in his Commentary (vol. 1, 121), remarks that "the security of a man's reputation or good name from the acts of detraction and slander, are rights to which every man is entitled by reason and natural justice, since without these it is impossible to have the perfect enjoyment of any other advantage or right." For further remarks see Blackstone.

According to English law, a libel is "anything written or printed, which from its terms is calculated to injure the character of another, by bringing him into hatred, contempt, or ridicule, and which is published without lawful justification or excuse, whatever the intention may have been." With respect to libel, and slander, the rule as deduced from an extensive class of cases, is, that when an occasion exists, which if fairly acted upon furnishes a legal protection to the party who makes the communication complained of, the *actual intention* of the party affords a boundary of legal liability. If he had that legitimate object in view which the occasion supplies, he is neither civilly nor criminally amenable; if, on the contrary, he used the occasion as a cloak of maliciousness, it can afford him no protection. The rule applicable for determining whether a particular communication is privileged has in a recent case been thus stated: "A communication made *bonâ fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter which without this privilege would be slanderous and actionable." With respect to the evidence of intention in an action for libel, the rule is, that a mere wicked and mischievous intention cannot make matter libellous which does not come within the definition of libel already given. But if libellous matter be published under circumstances which do not constitute a legal justification, and injury ensue, the malicious intention to injure will be presumed on the principle that every man must be presumed to intend the natural and ordinary consequences of his own act. "It is matter of law for the Judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice constituting what is called a privileged communication; and if at the close of the plaintiff's case there is no intrinsic or extrinsic evidence of malice, then it is the duty of the Judge to direct a verdict for the defendant without leaving the question of malice to the Jury" (B. L. M., 316, 318, Ed. IV).

499. Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person (11), intending to harm, or knowing or having reason to believe (26) that such imputation will harm the reputation of such person, is said,

Defamation.

except in the cases hereinafter excepted, to defame that person.

The essence of this offence consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed (Law Commissioners' Report, Note R., 119).

The law will infer malice where a statement is deliberately false in fact, and injurious to the character of another, and the publication is not privileged (Jacob Peter *v.* M. P. Dufour, W. R., 1864, 92). The definition of malice given in Bromage *v.* Proner, by Bailey, J., is as follows: "Malice, in common acceptance, means ill-will against a person; but, in its legal sense, it means a wrongful act done intentionally, without just cause or excuse" (4 B. and C., 254). Act XVIII of 1862 refers only to the High Court in its original jurisdiction (Criminal), and is not applicable to Mofussil Courts. Section 27 of that Act requires proof of the existence of the circumstances relied on as a defence before good faith can be presumed in a case of defamation. The *onus* of proving good faith is on the person making the imputation. Before such person can claim the benefit of Exception 9, he must show that he has exercised due care and caution (Sealey *v.* Ramnarain Bose, 4 W. R., 22).

A wrote to B informing him that he, B, was no gentleman. A question arose as to the remedy which B had against A. A charge of defamation would not lie under this section, because under the fourth Explanation no imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, lowers the character or credit of that person; and it could not be held that the mere writing of a letter to a person lowers his character or credit *in the estimation of others*.

Explanation 1.—It may amount to defamation (499) to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

The defamation of a deceased person agrees to some extent with the English law. A libel has been defined by Mr. Serjeant Hawkins to be a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one that is dead or the reputation of one that is alive, and expose him to public hatred, contempt, or ridicule. But it has been held with regard to libels on the memory of a person deceased, that a writing reflecting on the memory of a dead person, not alleged to be published with a desire to bring a scandal or contempt on the family of the deceased, or to induce him to break the peace, is not punishable as a libel (Reg. *v.* Topham, 4 Terms Reports, 127; and see Reg. *v.* Taylor, 5 Salkeld, 198; Holt on Lib., 230, 2nd Ed.; 5 M. J., 370).

Explanation 2.—It may amount to defamation (499) to make an imputation concerning a company or an association, or a collection of persons as such.

This explanation as to companies or associations finds a parallel in those cases wherein the Court of King's Bench has granted information at the suit of public bodies: *e. g.*, see 5 Barnewall and Alderson's Reports, 595. It would be very unjust, indeed, to deny a legal remedy to a combination of persons, when, by defamation of that combination, many individual persons might be injured (5 M. J., 370).

Explanation 3.—An imputation in the form of an alternative, or expressed ironically, may amount to defamation.

This explanation finds a corresponding idea in the English law, as where it has been sarcastically said of a lawyer, with intent to convey an entirely opposite idea, as that "he is an *honest* lawyer" (5 M. J., 370).

Explanation 4.—No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person, in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

This explanation may be said to agree in all points with the English law, bearing in mind that, if the imputations therein described are written ones, the author is liable, as by the Penal Code, to imprisonment by criminal process, but if spoken ones, by civil action is the remedy (5 M. J., 370). With reference to the words "by signs or by visible representations," alluded to in Section 499 itself, it is to be noticed that this is a class of defamation likely to do as much mischief as any written production, and it has always been considered by the English law as a serious offence. Thus in Archibald's Criminal Law it is laid down that a malicious defamation of any person may be made public by signs or pictures in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule. Indeed, publishing anything of a man which renders him ridiculous or contemptible is as much a libel as serious charges are, and very often has a wider effect. Successive cases in England have rendered the limits within which a libel may be thus expressed, and punishable, and the Penal Code merely echoes the English law, and the words are so judiciously wise by the use of the phrase "visible representations" as to take in every possible form of defamation which ingenuity can devise (5 M. J., 371).

B's only remedy then was under Section 504, P. C., and whether A, informing B that he was no gentleman, intended or knew it to be likely

that the provocation would cause him to break the public peace, was a question of fact to be determined by the Magistrate who tried the case (Book Circular VIII, Criminal Side, 3rd February, 1865, J. C., O).

Illustrations.

(a.) A says "Z is an honest man, he never stole B's watch," intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(b.) A is asked who stole B's watch. A points to Z intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(c.) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

Exception 1.—It is not defamation (499) to impute anything which is true concerning any person (11), if it be for the public (12) good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

The remaining exceptions, say the framers of the Code, do not require that the imputation should be *true*, only that it should be made in good faith, and as examples under this Exception 1, they say: "It is easy to put cases about of which there could be scarcely any difference of opinion. A person who has been guilty of gross acts of swindling at the Cape comes to Calcutta and proposes to set up a house of agency. A person who has been forced to fly from England on account of his infamous vices repairs to India, opens a school, and exerts himself to obtain pupils." To tell the truth about such persons for the public good would come under this exception. And they give the following as examples where spreading of reports true in themselves would not come under this exception: "The proclaiming to the world that a man keeps a mistress, that he is too much addicted to wine, that he is pernicious in his house-keeping or slovenly in his person, these can never or seldom produce any good to the public, sufficient to compensate for the pain given to the person attacked or those connected with him."

Exception 2.—It is not defamation (499) to express in good faith (52) any opinion whatever respecting the conduct of a public servant (21) in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

The following illustrations are made from the notes on this chapter by the Law Commissioners. A says that B, a Magistrate, is not fit for the post he holds. A says that B, who has got up the petition against the Income Tax measure, is a foolish meddler. A says that B, who was tried for criminal breach of trust by the Magistrate and was acquitted, was

really guilty, and that of C and D, two witnesses on the trial, whose evidence was contradictory, C alone could be believed. "To require," they say, "in such cases that the imputation should be true, would be to render these exceptions mere nullities." The above are questions about which honest and discerning men hold diametrically opposite opinions, and to require a man to prove to the satisfaction of a Court of Law that his opinion is correct, is to prohibit all discussion on such questions.

Exception 3.—It is not defamation (499) to express in good faith (52) any opinion whatever respecting the conduct of any person (11) touching any public (12) question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such a meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Exception 4.—It is not defamation (499) to publish a substantially true report of the proceedings of a Court of Justice (20), or of the result of any such proceedings.

Explanation.—A Justice of the Peace or other Officer holding an inquiry in open Court, preliminary to a trial in a Court of Justice (20), is a Court within the meaning of the above section.

Exception 5.—It is not defamation (499) to express in good faith (52) any opinion whatever respecting the merits of any case, Civil or Criminal, which has been decided by a Court of Justice (20), or respecting the conduct of any person (11) as a party, witness, or agent in such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations.

(a.) A says—"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception, if he says this in good faith; inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(b.) But if A says—"I do not believe what Z asserted at that trial,

because I know him to be a man without veracity," A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Exception 6.—It is not defamation (499) to express in good faith (52) any opinion respecting the merits of any performance which its author has submitted to the judgment of the public (32), or respecting the character of the author, so far as his character appears in such performance, and no further.

Explanation.—A performance may be submitted to the judgment of the public (32), expressly or by acts (33), on the part of the author, which imply such submission to the judgment of the public.

Illustrations.

(a.) A person who publishes a book, submits that book to the judgment of the public.

(b.) A person who makes a speech in public, submits that speech to the judgment of the public.

(c.) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d.) A says of a book published by Z—"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith; inasmuch as the opinion which he expresses of Z, respects Z's character only so far as it appears in Z's book, and no further.

(e.) But if A says—"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Exception 7.—It is not defamation (499) in a person (11) having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith (52) any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in

service ; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

Exception 8.—It is not defamation (499) to prefer in good faith (52) an accusation against any person (11) to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration.

If A in good faith accuses Z before a Magistrate ; if A in good faith complains of the conduct of Z, a servant, to Z's master ; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

Exception 9.—It is not defamation (499) to make an imputation on the character of another, provided that the imputation be made in good faith (52) for the protection of the interests of the person (11) making it, or of any other person, or for the public (12) good.

A person using defamatory expressions for the protection of his son's interests, is not privileged unless the imputation is made in good faith, *i. e.*, with due care and attention (Queen *v.* Persoram Dass, 3 W. R., 45).

Under this exception it has been held that a charge will lie against a person for defamatory expressions used by him against his prosecutor, while he was a defendant in a criminal case, when those expressions were not used with due care and attention (Mohunt *v.* Persoram Dass, 5 R. J. P. J., 42).

Illustrations.

(a.) A, a shopkeeper, says to B, who manages his business—"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception if he has made this imputation on Z in good faith for the protection of his own interests.

(b.) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception.

Exception 10.—It is not defamation (499) to convey a caution, in good faith (52), to one person (11) against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public (12) good.

[*Ct. of S. or M. of*
1st Class.]

[*Uncog. Bailable.*
Warrant.]

*500. Whoever defames (499) another shall be pun-

Punishment for de-
famation.

ished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Libels upon individuals.—No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or society be interrupted, or even exposed by types or figures, the act by the law of England is a libel (*Reg. v. Cobbett*). Though the words impute no punishable crime, yet if they contain that sort of imputation which is calculated to vilify a man, and to bring him into hatred, contempt, and ridicule, an indictment lies (*Thorley v. Lord Kerry*; *Digby v. Thompson*). With regard to libels on the memory of persons deceased, it has been held that a writing reflecting on the memory of the dead person, not alleged to be published with the design to bring scandal or contempt on the family of the deceased, or to induce them to break the peace, is not punishable as libel (*Reg. v. Topham*; *Reg. v. Taylor*).

Proof of introductory averments.—Where the indictment contains introductory averments inserted for the purpose of explaining and pointing the libel, such averments must be proved as said. It frequently happens that the libel is directed against the prosecutor in a particular character, and an attempt to libel him in that character is averred. In such case it must be made to appear that the prosecutor bore that character. *In re Collins v. Carnegie*, held that to support an averment that the party was a physician, it is necessary to give regular evidence that he possessed lawful authority to practise as such. In all cases where the libel itself is an admission of the particular character alleged, further proof of such particular character is unnecessary; for although a totally irrelevant allegation may be regarded as surplusage, one which is material and descriptive of the legal injury must be proved as laid. The declarations of spectators while viewing a libellous picture publicly exhibited in a public exhibition room, were admitted as evidence, to show that the figures portrayed were meant to represent the parties alleged to have been libelled (*Dubois v. Beresford*).

Proof of publication.—The question of publication is ordinarily one of mere fact, to be decided by the Jury, but this, like all other legal technical terms, involves law as well as fact; and it is a question for the Court, in doubtful cases, whether the facts when proved constitute a publication in point of law (2 Stark on Slander, 311).

Proof of inuendos.—Where in order to bring out the libellous sense of the words, inuendos are inserted in the indictment, they must if material be proved by witnesses acquainted with the parties and with the transaction to be explained. It is sufficient if such witnesses speak in the first instance as to their belief with regard to the intended application of the words. The grounds of such belief may be inquired into on cross-examination (2 Stark on Slander, 51). If a good inuendo describing a particular meaning to certain words is not supported in evidence, the party will not be permitted to ascribe another meaning to those words (*Williams v. Scott*). Thus where the words, in fact, imputed either a

fraud or a felony, but by the inuendo were confined to the latter, ruled that the plaintiff must prove that they were spoken in the latter sense (*Smith v. Carey*).

Proof of malice.—Where a man publishes a writing which upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary on the part of the prosecution to give evidence of any circumstances from which malice may be inferred (*Reg. v. Harvey*). In such a case, it is incumbent upon the defendant, if he seeks to discharge himself from the consequence of a publication, to show that it was made under circumstances which justified it (*Reg. v. Burdett*). When the publication is *prima facie* excusable on account of the cause of writing it,—*e. g.*, servants' characters, confidential advice, communications to persons who ask it or have a right to expect it (*Bromage v. Prosser*). Where a man has a right to make a communication, you must either show malice intrinsically from the language of the letter, or prove express malice (*Wright v. Woodgate*).

Proof of intent.—Where the malicious intent of the defendant is by averment in the indictment pointed to a particular individual, or to a particular act or offence, the averment must be proved as laid: thus where the indictment alleged a publication of a libel, with intent to disparage and injure the prosecutor in his profession of an attorney, it was held that proof of a publication to the prosecutor only did not maintain the indictment, and that the intent ought to have been averred to provoke the prosecutor to a breach of the peace (*Reg. v. Wegener, Roscoe, 611—631*).

In all cases where the matter is defamatory in its nature, the *onus* of proving the truth of his statement, or at least that he had reasonable ground for believing it to be true, and was actuated in making such statement, not by malicious motives, but by intelligent zeal for the public interest, lies on the person making the statement (*N. W. P., H. Ct. R., 87*).

A leading case on how far the master or principal is criminally liable for the acts of his servant or agent is that of *Rex v. Almon*, 20 State Trials. It was held that the purchase of a pamphlet in a public open shop of a known professed bookseller, from a person acting in the shop as his servant, was *prima facie* evidence of the publication by himself, and (in the absence of any explanation or contradiction) would, if believed, be sufficient to sustain a conviction (see *S. M. & S. 92—95*).

In an action for libel where the title of an article of manufacture, which was the subject of an advertisement, was described in a critique as "very silly, very slangy, and very vulgar," and as having "been forced upon the notice of the public *ad nauseam*." Held, by Mellor and Hannen, to be libellous and actionable; *Lush, J., dissentiente* (*Jenner v. A'Beckett, 17 W. R. E. C., 8*).

An editor causing the despatch by post of his newspaper, containing libellous matter, to a district other than that in which the paper is pro-

duced, would in law be a publication of the libel in that district (1 R. C. C. R., 34).

The Penal Code makes no distinction between written and spoken defamation (2 W. R., 37). Slander by English law, *i.e.*, the *word spoken*, is punishable by civil action only.

The prosecution is not bound to prove that the imputation was made in bad faith, but it rests with the accused to show that his statement was made with due care and attention and caution (4 W. R. C. R., 22). If the accused relies upon any one or more of the exceptions to prove that he is not guilty of the offence charged against him, he must prove the facts which indicate that his act comes within the provisions of some of the exceptions.

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.
[Warrant.]*]

*501. Whoever prints or engraves any matter, knowing or having good reason to believe (25) that such matter is defamatory (499) of any person (11), shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.
[Warrant.]*]

*502. Whoever sells or offers for sale any printed or engraved substance containing defamatory (499) matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

Section 5, Act VI of 1864, provides for the whipping of juvenile (Section 83, P. C.) offenders convicted of offences specified in the sections marked * in the chapter. Juveniles may be punished with whipping only in *lieu* of any other punishment, but whipping may be inflicted for *first* or *any other* offence, and is to be administered in the way of school discipline, with a light rattan (par. 6, Circular No. 8, dated 8th April, 1864). No *female*, nor any person sentenced to *death* or *transportation*, or *penal servitude* or imprisonment for *more than five years*, shall be whipped (Section 7, Act VI of 1864).

503. Whoever *threatens another with any injury* (44) to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act (33) which he is not legally bound to do (43), or to omit (33) to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration.

A, for the purpose of inducing B to desist from the prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

If a threat is very trivial in its nature it might come within the provisions of Section 95, *ante*.

Person (*persona*, *Lat.*), the individuality of a human being; individual character or station; bodily form or substance. Persons are divided into: (1) *Natural*, such as God formed them; and (2) *Artificial*, such as are created and devised by human laws for purposes of society and Government, which are called corporations or bodies politic (W. L. L., 714).

Reputation, credit, honour, character, good name (W. L. L., 827).

Property, the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods, or chattels, or

which does not depend on another's courtesy. Property is of three sorts : absolute, qualified, and possessory (see Section 22 of this Code, and notes thereunder.)

Threatens to injure.—Where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the Sikar and would get him six months' imprisonment if he (the complainant) did not let his sister go. *Held* that these words did not constitute either criminal intimidation, within the meaning of this section (there having been no threat of an *injury* in the sense of the Code) or any other offence known to the law (8 Bo. H. C. R., 101).

[Any Mag.]

[Uncog. Bailable.]
[Warrant.]

*504. Whoever intentionally insults, and thereby gives provocation to any person (11), intending or knowing it to be likely that such provocation will cause him to break the public peace (159), or to commit any other offence (40), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

With reference to what constitutes an insult under the Penal Code, the framers of the Code remarked that it depended on the calm, dispassionate opinion of the Judge, whether the act complained of, from its nature, and attendant circumstances, was calculated to insult, and was done with intent to insult, the complainant, and that it did not depend on the sensitive feelings of the complainant. The provisions of this section include insolence by a servant towards his master.

[M. of 1st or 2nd
Class.]

[Uncog. Not bailable.]
[Warrant.]

*505. Whoever circulates or publishes any statement, rumour, or report which he *knows to be false*, with intent to cause any officer, soldier, or sailor in the Army or Navy of the Queen (13) to mutiny (Chapter VII), or with intent to cause fear or alarm to the public (12), and thereby to induce any person to commit an offence against the State (Chapter VI), or against the public tranquillity (Chapter VI), shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both.

Knows to be false.—From the wording of this section it appears that if

the statement circulated or published be true, whatever be the intent of the publisher or circulator, and whatever the result of the publication or circulation, no offence has been committed under this section, the one requisite and chief point of proof being knowledge that the statement was *false*.

[*M. of 1st or 2nd
Class.*]

[*Uncog. Bailable.*
[*Warrant.*]

*506. Whoever commits the offence of criminal intimidation (503) shall be punished with imprisonment of either description (53) for a term which may extend to two years, or with fine, or with both; and if the threat be to cause death

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.*
[*Warrant.*]

(46) or grievous hurt (320), or to cause the destruction of any property by fire, or to cause an offence punishable by death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. (*Triable summarily* under Section 222, C. C. P.)

It was held that if the person at one time criminally intimidates three different persons, and each of these persons bring a separate charge against him, the accused may be convicted for an offence as against each person, and be punished separately for each offence (9 W. R., 30).

[*Ct. of S. or M. of
1st Class.*]

[*Uncog. Bailable.*
[*Warrant.*]

*507. Whoever commits the offence of criminal intimidation (503) by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description (53) for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

A writes an anonymous letter threatening B, and sends the letter to C, living with B, expecting and believing C would show the letter to B. A is guilty under this section.

[M. of 1st or 2nd
Class.][Uncog. Bailable.]
[Warrant.]

*508. Whoever voluntarily (39) causes or attempts to cause any person to do (33) anything which that person (11) is not legally bound to do (43), or to omit (33) to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure, if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description (53) for a term which may extend to one year, or with fine, or with both.

Act caused by inducing a person to believe that he will be rendered an object of the Divine displeasure.

Illustrations.

(a.) A sits dhurma at Z's door, with the intention of causing it to be believed that by so sitting he renders Z an object of Divine displeasure. A has committed the offence defined in this section.

(b.) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

[M. of 1st Class.]

[Uncog. Bailable.]
[Warrant.]

*509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Word or gesture intended to insult the modesty of a woman.

[Any Mag.]

[Uncog. Bailable.]
[Warrant.]

*510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to

Misconduct in public by a drunken person.

cause annoyance to any person (11), shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both. (*Triable summarily* under Section 222, C. C. P.)

The immunity from punishment which our law, through motives of humanity and justice, allows to persons mentally affected, is not extended to him who commits a felony or other offence through drunkenness; he shall not be excused, because his incapacity arose from his own default, but is answerable equally as if he had been when the act was done in the full possession of his faculties, a principle of law which is embodied in the familiar adage, *qui peccat ebrius luat sobrius*. But although drunkenness is clearly no excuse for the commission of any crime, yet proof of the fact of drunkenness may be very material, as intending to show the *intention* with which the particular act charged as an offence was committed, and whether the act done was accidental or designed (B. L. M., 17, Edition IV).

By the Penal Code, the punishment for being drunk is simple imprisonment for twenty-four hours, or ten rupees fine, or both.

By Section 34, Clause 6, of Act V of 1861 (Police Act), the offender is liable to imprisonment for eight days, or fine up to fifty rupees. Cannot give him both fine and imprisonment.

It appears that by Section 510, P. C., that the offender *must* cause annoyance, whereas by Section 34, Clause 6, Act V of 1861, "any person who is found drunk or riotous, *or who is incapable of taking care of himself*" is punishable.

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

An attempt to commit an offence is not punishable by whipping (Letter No. 425 of 1864, H. Ct., Calcutta).

[Ct. by which the offence attempted is triable.]

[According as an offence is one in respect of which a summons or warrant shall ordinarily issue.]

[According as the offence is one in respect of which Police may arrest without warrant or not. According as the offence contemplated by offender is bailable or not.]

511. Whoever attempts to commit an offence (40) punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act (33) towards the commission of the offence, shall, where no express provision (express provision is made for offences against the State, Chapter VI) is made by this Code for the punishment of such attempt, be punished with imprisonment of any description, provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term (57) provided for that offence, or with such fine as is provided for the offence, or with both.

Punishment for attempting to commit offences punishable with transportation or imprisonment.

Illustrations.

(a.) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b.) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt, in consequence of Z having nothing in his pocket. A is guilty under this section.

The law as contained in this section is different materially from the English law ; there a man cannot be convicted of an attempt to commit a felony, unless, if no interruption had taken place, the attempt could have been carried out with success.

Vide note under Section 376, P. C., and Section 75, P. C., a person

who is convicted of an attempt to commit an offence under Chapters XII and XVII cannot, because he has been previously convicted, be subjected to the enhanced punishment (Madras H. Ct., 1865).

A conviction on a charge of attempting to obtain a gratification as a reward for influencing a public servant in the exercise of his public functions, was held to be illegal as disclosing no legal offence when the charge omitted to state the person or persons for whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions (3 W. R. C. R., 69).

Vide note under Section 307, *in re* Reg. v. Francis Cassidy, where the apparent inconsistency between the English law with reference to attempts and the provisions of this Section 511 are said to be explained; it is difficult to see that the explanation as to the difference of English law and the provisions of this section, being the same, has been satisfactorily established.

APPENDIX I.

No. I.

Questions which may be put to a Medical witness in a case of suspected Poisoning after post-mortem examination of the body

1. Did you examine the body of _____ late a resident of _____ ?
and, if so, what did you observe ?
2. What do you consider to have been the cause of death ? State your reasons.
3. Did you find any external marks of violence on the body ? If so, describe them.
4. Did you observe any unusual appearances on further examination of the body ? If so, describe them.
5. To what do you attribute these appearances—to disease, poison, or other cause ?
6. If to poison, then to what class of poisons ?
7. Have you formed an opinion as to what particular poison was used ?
8. Did you find any morbid appearances in the body besides those which are usually found in cases of poisoning by _____ ?
If so, describe them.
9. Do you know of any disease in which the post-mortem appearances resemble those which you observed in the present case ?
10. In what respect do the post-mortem appearances of that disease differ from those which you observed in the present case ?
11. What are the symptoms of that disease in the living ?
12. Are there any post-mortem appearances usual in cases of poisoning by _____, but which you did not discover in this instance ?
13. Might not the appearances you mention have been the result of spontaneous changes in the stomach after death ?
14. Was the state of the stomach and bowels compatible or incompatible with vomiting and purging ?
15. What are the usual symptoms of poisoning by _____ ?
16. What is the usual interval between the time of taking the poison and the commencement of the symptoms ?

17. In what time does _____ generally prove fatal?
18. Did you send the contents of the stomach and bowels (or other matters) to the Chemical Examiner?
19. Were the contents of the stomach (or other matters) sealed up in your presence immediately on removal from the body?
20. Describe the vessel in which they were sealed up and what impression did the seal bear?
21. Have you received a reply from the Chemical Examiner; if so is the report now produced that which you received?
22. (If a female adult) what was the state of the uterus?

No. II.

Questions that may be put to non-professional witnesses in a case of suspected Poisoning.

1. Did you know _____ late a resident of _____? If so, did you see him during his last illness and previously?
2. What were the symptoms from which he suffered?
3. Was he in good health previous to the attack?
4. Did the symptoms appear suddenly?
5. What was the interval between the last time of eating or drinking and the commencement of the symptoms?
6. What was the interval between the commencement of the symptoms, and death?
If death occurred.
7. What did the last meal consist of?
8. Did any one partake of this meal with _____?
9. Were any of them affected in the same way?

[If any of the following symptoms have been omitted in answer to question I, special questions may be asked regarding them, as follows.]

10. Had _____ ever suffered from a similar attack before?
11. Did vomiting occur?
12. Was there any purging?
13. Was there any pain in the stomach?
14. Was _____ very thirsty?
15. Did he become faint?
16. Did he complain of head-ache or giddiness?
17. Did he appear to have lost the use of his limbs?
18. Did he sleep heavily?
19. Had he any delirium?
20. Did convulsions occur?
21. Did he complain of any peculiar taste in the mouth?
22. Did he notice any peculiar taste in his food or water?

23. Was he sensible in the intervals between the convulsions?

24. Did he complain of burning or tingling in the mouth and throat, or of numbness and tingling in the limbs?

Questions which may be put to a Medical witness in a case of supposed death by wounds or blows, after post-mortem examination of the body.

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as to the position of the person inflicting such a wound with respect to the person receiving it?

20. Is it possible for such a wound to have been inflicted by any one on his own person? Give your reasons.

In gun-shot wounds.

21. Give the precise direction of the wound.

22. Did the appearances of the wound indicate that the gun had been discharged close to the body, or at some distance from it?

23. Did you find any slug, bullet, wadding, &c., in the wound, or had it made its exit?

24. Do you think it possible that you could have mistaken the aperture of entrance for that of exit?

No. IV.

Questions that may be put to a Medical witness in a case of supposed Infanticide after post-mortem examination of the body.

1. Did you examine the body of a ^{Male.}_{Female,} child sent to you by the District Superintendent of Police on the _____ of _____ 187? and, if so, what did you observe?

2. Can you state whether the child was completely born alive, partially born alive, or born dead? State the reasons for your opinion.

3. What do you consider to have been the cause of death? Give your reasons.

4. What do you believe to have been the uterine age of the child? State your reasons.

5. What do you believe to have been the extra-uterine age of the child? Give reasons.

6. Did you find any marks of violence or other unusual appearances externally? If so, describe them accurately.

7. Did you find any morbid or unusual appearances on examination of the body, internally? If so, describe them accurately.

8. Do you believe the injuries you observed to have been inflicted before, or after death? Give reasons.

9. Can you state how they were inflicted? Give reasons.

10. Do you consider that they were accidental or not? Give reasons.

11. Had the infant respired fully, partially, or not at all?

12. Did you examine the person of _____ the alleged mother of the infant? If so, have you reason to suppose that she was recently delivered of a child? Can you state approximately the date of her delivery? Give reasons.

No. V.

Questions that may be put to a Medical witness in a case of supposed death by hanging or strangulation.

1. Did you examine the body of _____ late a resident of _____ and, if so, what did you observe?
2. What do you consider to have been the cause of the death? State the reasons for your opinion.
3. Did you observe any external marks of violence upon the body?
4. Did you observe any unnatural appearances on examination of the body internally?
5. Was there any rope or other such article round the neck when you saw the body?
6. Can you state whether the mark (or marks) you observed were caused before, or after death?
7. By what sort of articles do you consider the deceased to have been hanged (or strangled)?
8. Could the mark you observed have been caused by the rope, or other article now before you (No. _____ of the police charge-sheet)?
9. Do you think that this rope could have supported the weight of the body?
10. Would great violence be necessary to produce the injuries you describe?
If strangulation.

No. VI.

Questions that may be put to a Medical witness in a case of supposed death by drowning, after post-mortem examination of the body.

1. Did you examine the body of _____ late a resident of _____; and, if so, what did you observe?
2. What do you consider to have been the cause of death? State your reasons.
3. Were there any external marks of violence upon the body? If so, describe them.
4. Describe any unnatural appearance which you observed on further examination of the body.
5. Did you find any foreign matters, such as weeds, straw, etc., in the hair, or clenched in the hands of the deceased, or in the air-passages, or attached to any other part of the body?
6. Did you find any water in the stomach?

Questions that may be put to a Medical witness in a case of alleged Rape.

- No. VIII.

1. Have you examined _____?
2. Have you done so on several different occasions, so as to preclude

the possibility of your examinations having been made during lucid intervals of insanity?

3. Do you consider him to be capable of managing himself, and his personal affairs?

4. Do you consider him to be of "unsound mind"; in other words, *intellectually insane*?

5. If so, do you consider his mental disorder to be complete or partial?

6. Do you think he understands the obligation of an oath?

7. Do you consider him, in his present condition, competent to give evidence in a court of law.

8. Do you consider that he is capable of pleading to the offence of which he now stands accused?

9. Do you happen to know how he was treated by his friends (whether as a lunatic, an imbecile, or otherwise) prior to the present investigation, and the occurrences that have led to it?

10. What, as far as you can ascertain, were the general characteristics of his previous disposition?

11. Does he appear to have had any *previous attacks* of insanity?

12. Is he subject to insane *delusions*?

13. If so, what is the general character of these? Are they harmless or dangerous? How do they manifest themselves?

14. Might such delusion or delusions have led to the criminal act of which he is accused?

15. Can you discover the *cause* of his reason having become affected? In your opinion, was it *congenital* or *accidental*?

16. If the latter, does it appear to have come on suddenly or by slow degrees?

17. Have you any reason for believing that his insanity is of *hereditary* origin? If so, please to specify the grounds for such an opinion, and all the particulars bearing on it, as to the insane parents or relatives of the accused; the exciting cause of his attack; his age when it set in; and the type which it assumed.

18. Have you any reason to suspect that he is, in any degree, *feigning* insanity? If so, what are the grounds for this belief?

19. Is it possible, in your opinion, that his insanity may have followed the actual commission of his offence, or been caused by it?

20. Have you any reason to suppose that the offence could have been committed during a *lucid interval*, during which he could be held responsible for his act? (If so, what appears to you to have been the duration of such lucid interval?) Or, on the contrary, do you believe his condition to have been such as altogether to absolve him from legal responsibility?

21. Does he now display any signs of *homicidal* or of *suicidal* mania, or has he ever done so to your knowledge?

22. Do you consider it absolutely necessary, from his present condition, that he should be confined in a lunatic asylum? Or, again,

23. Do you think that judicious and unremitting supervision *out of an asylum*, might be sufficient to prevent him from endangering his own life, or property of others?

No. IX.

Questions that may be put to a Medical witness in a case of alleged causing Miscarriage. (Secs. 312-316, I. P. C.)

1. Did you examine the person of Mussamat _____? If so, when? and what did you observe?

2. Are you of opinion that a miscarriage has occurred, or not? Give your reasons.

3. In what mode do you consider the miscarriage to have been produced? Whether by violence, per vaginum, or by external violence, or by the use of irritants *internally*? Give your reasons.

4. It is alleged that a drug called _____ was used, state the symptoms and effects which the administration internally of this drug would produce. Do you consider that it would produce miscarriage?

5. Can you state whether the woman was quick with child when the miscarriage was produced? State your reasons.

6. Did you see the foetus? If so, at what period of gestation do you consider the woman to have arrived?

No. X.

Questions that may be put to a Medical witness in a case of Grievous Hurt.

1. Have you examined _____? If so, state what you observed.

2. Describe carefully the marks of violence which you observed.

3. In what way do you consider the injuries to have been inflicted? If by a weapon, what sort of a weapon do you think was used?

4. Do you consider that the injuries inflicted could have been caused by the weapon now shown to you (No. _____ of police charge-sheet)?

5. What was the direction of the wound, and can you form an opinion as to the position of the person inflicting such a wound with respect to the person receiving it?

6. Is it possible for such a wound to have been inflicted by any one on his own person? Give your reasons.

The Magistrate, in putting this question, will show the I. P. C. to the witness, or the Magistrate may vary the form of the question so as to elicit the required information without calling the witness's attention to the I. P. Code.

7. Do you consider that the injuries inflicted constitute any of the forms of "grievous hurt" defined in Section 320 of the Indian Penal Code? If so, which of them? Give your reasons.

8. Do you consider that the person injured is now out of danger?

9. It is alleged that the injuries were caused by _____; could they have been caused in the manner indicated?

10. Have you chemically, or otherwise, examined the stains (on the weapon, clothes, &c.) now before you (No. _____ in the police charge-sheet)?

11. Do you believe the stains to be those of blood?

[N.B.—In case of the injuries being gun-shot wounds, questions XXI to XXIV, under the head of No. III (Death by Wounds) may be put to the witness.]

APPENDIX II.



PROCEDURE, CRIMINAL RECOVERING AND STRIKING OFF FINES.

[Book Circular No. XXII of 1874.]

TO ALL SESSIONS JUDGES AND MAGISTERIAL OFFICERS, IN OUDH.

The attention of all Magisterial Officers is drawn to the provisions
Present: of the Law in regard to the realization of fines imposed
CHARLES CURRIE, Esq., on conviction of accused persons.
Judicial Commissioner.

2. Section 5, Act I 1868, declares that "the provisions of Sections 63 to 70, both inclusive, of the Indian Penal Code, and of Section 307 of the Code of Criminal Procedure shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary."

3. Section 307, Clause 3, Criminal Procedure Code, declares that "this section shall not apply in cases in which any special procedure is laid down by any special or local law in force for the time being for the recovery of any fine, but shall apply to cases in which no such procedure is laid down."

4. An examination of the provisions of the several Acts under which fines are ordinarily imposed, leads to the conclusion that these provisions may be classified under four main heads, viz. :—

(1.) Those to which the provisions of Sections 63 to 70, Penal Code, as well as Section 307, Criminal Procedure Code, are applicable.

(2.) Those to which the provisions of Section 307, Criminal Procedure Code, alone are applicable.

(3.) Those which contain provisions similar to those in force prior to the enactment of the Penal Code.

(4.) Those which contain special provisions within themselves.

5. Under Class I will come all fines imposed under the following Acts :—

Act XLV 1860. Penal Code.

Act XIV 1868. Contagious Diseases.

Act XXVI 1870. Prisons.
 Act I 1871. Cattle Trespass.
 Act X 1871. Excise.

6. Under Class II may be arranged the following Acts :—

Act XXI 1857. Gaming, as it contains no provision for the levy of fines imposed under the Act.
 Act VII 1865, Section 13. Forests.
 Act III 1867, Section 17. Public Gambling.
 Act XXV 1867, Section 17. Printing Presses.
 Act XVIII 1869, Section 37, Clause 2. Stamps.
 Act XXI 1869, Section 26. European Vagrancy.
 Act VIII 1870, Section 6. Female Infanticide.
 Act III 1871, Section 22, Clause 3. Paper Currency.
 Act VII 1871, Section 82, Clause 2. Emigration.
 Act VIII 1871, Section 81, Clause 4. Registration.

As the provisions of the sections of the several Acts quoted above are identical, they are here extracted for facility of reference.

“All fines imposed under this Act may be recovered, if for offences committed outside the limits of the Presidency towns, in the manner prescribed by the Code of Criminal Procedure.”

The following addition occurs in Act XVIII 1869 :—

“In the case of a firm, the Magistrate imposing the fine may issue a warrant for the levy of the amount by distress and sale of any movable property belonging to the firm or to all or any of the members thereof.”

7. Class III includes—

*Act XVIII 1854, Section 34. Railways.
 *Act VIII 1860, Section 19. Electric Telegraph.
 Act XXXI 1860, Sections 44, 45, 46, and 47. Arms and Ammunition.
 Act V 1861, Sections 37, 38, and 39. Police.
 Act XVI 1861, Sections 16, 17, and 18. Stage Carriages.
 Act XXXI 1861, Sections 12, 14, and 15. Saltpetre and Salt.
 *Act III 1864, Section 24. Foreigners.
 *Act XXII 1864, Sections 21, 22, and 23. Military Cantonments.
 *Act XIV 1866, Section 56. Post Offices.

The provisions of these Acts are almost identical, and for facility of reference, an example is given. It must be noted, however, that the provisions of Act XXII of 1864 vary from the others, in so far that the imprisonment, in case of fine not being levied, cannot exceed one month.

Act V 1861, Sections 37, 38, and 39.

“37. All forfeitures or penalties imposed under the authority of this Act for offences punishable by a Magistrate may, in case of nonpayment thereof, be levied by distress and sale of the property of the offender within the limits of the jurisdiction of
 Levy of forfeiture and penalties by distress.

the Magistrate of the district by warrant under the hand of the Magistrate who made the order.

“38. In case any such forfeiture or penalty shall not be forthwith paid, the Magistrate may order the offender to be apprehended and detained in safe custody until the return can be conveniently made to such warrant of distress, unless the offender shall give security to the satisfaction of the Magistrate for his appearance at such place and time as shall be appointed for the return of the warrant of distress.

“39. If upon return of such warrant it shall appear that no sufficient distress can be had whereon to levy such fine, and the same shall not be forthwith paid, or in case it shall appear to the satisfaction of the Magistrate by the confession of the offender or otherwise, that he has not sufficient property whereupon such fine or sum of money could be levied if a warrant of distress were issued, the Magistrate may by warrant under his hand commit the offender, provided* he is not a European British subject, to prison, there to be imprisoned according to the discretion of the Magistrate for any term not exceeding two calendar months when the amount of

Imprisonment if distress not sufficient.

* This provision does not occur in the Acts entered under Class III to which an asterisk is affixed.

fine shall not exceed 50 rupees and for any term not exceeding four calendar months when the amount shall not exceed 100 rupees, and for any term not exceeding six calendar months in any other case, the commitment to be determinable in each of the cases aforesaid on payment of the amount.”

8. The provisions of Acts XVIII, 1854, VIII, 1860, and XIV, 1866, apply to offences under the said Acts punishable by fine only—and under those Acts as well as under Act III, 1864 (to which the procedure prescribed by Section 26, Act XLVIII, 1860 applies) persons can be kept to hard labour in default of payment of fine.

9. Only three Acts fall under Class IV, viz. Act XIV, 1843, Act XIII, 1857, and Act XV, 1873. Under the two former Acts, if the fine is not paid, imprisonment must be awarded and the accused must be kept in prison till the term expires or the fine be paid. Section 45, Act XV, 1873 (North-Western Provinces and Oudh Municipalities) is annexed for facility of reference.

“45. Whoever infringes any rule made by a Committee and confirmed, as directed in this Act, shall be liable to a fine not exceeding fifty rupees, and in the case of a continuing infringement to a fine not exceeding five rupees for every day after notice from the Committee of such infringement.

Penalty for infringement of rules or non-payment of fines.

“In default of payment of any fine imposed under this section, the defaulter shall in the case of a continuing infringement be liable to imprisonment for a term not exceeding one month, and in any other case to imprisonment for a term not exceeding eight days.”

10. From the above classification it will be seen that fines under Class I are alone leviable under the provisions of Section 70, Penal Code, and

consequently all fines under Classes II, III, and IV, should, if unrealized, be removed from the fine register as soon as the term of imprisonment awarded expires.

11. On the return of the warrant of conviction by the Superintendent of the Jail, the Nazir should see whether any fine was imposed and if so whether it has been realized or not, and should at once report to the Magistrate, with a view to having written off the register of fines, any portion still unrealized, except in cases under Class I, when the amount cannot be written off until the Magistrate is satisfied that the fine is incapable of recovery under rules XIX to XXII, par. 81, Preface to Criminal Procedure Code.

LUCKNOW :
6th July, 1874.

JOHN S. HANNAGAN,
Registrar,
Judicial Commissioner's Court, Oudh.

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THE END.

E. W. C. J.

8/12/10



